Petition

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

81-434

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OSVALDO MOLINA, *Petitioner*

v.

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

Of Counsel:

HECTOR M. LAFFITTE
Chase Manhattan Bank Bldg.
Hato Rey, Puerto Rico 00918

ANTONIO CORDOVA
Bank of San Juan Tower
San Juan, Puerto Rico 00901

MICHAEL J. HENKE
Counsel of Record

JOHN D. TAURMAN
ANN M. ASHTON
VINSON & ELKINS
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-6500

Counsel for Petitioner
Osvaldo Molina

September 2, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

1. Whether, where a case was tried under a "preponderance of the evidence" standard of proof and on review the Puerto Rico Supreme Court prescribed a "clear, strong, and convincing evidence" standard, the court violated federal due process requirements by rendering judgment without remanding for the taking of additional evidence.

2. Whether federal due process requires or even permits the application of a "clear, strong and convincing evidence" standard of proof to challenges filed by voters or candidates to the validity of ballots cast for candidates of opposing political parties.

3. Whether petitioner has been denied a fundamentally fair election, and hence deprived of due process of law, by the Puerto Rico Supreme Court's novel and unanticipated electoral rulings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. The Puerto Rico Supreme Court's Failure to Remand for the Submission of Additional Evidence in Light of the New and Stricter Standard of Proof It Specified Denied Petitioner Due Process of Law and Conflicted with Pertinent Holdings of this Court and of the Federal Courts of Appeals 11

II. The Puerto Rico Supreme Court Acted Contrary to this Court's Decisions When It Ruled that Under the Due Process Clause, Challenges to the Validity of Election Ballots Must Be Proven by More than a Preponderance of the Evidence ... 17

III. The Puerto Rico Supreme Court's Decision, Including Its Unforeseeably Restrictive Ruling on the Technical Requirements for Challenging Ballots, Raises the Important Question Whether the Due Process Clause Protects Candidates for Public Office Against the Denial of a Fundamentally Fair Election 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases	Page
Addington v. *Texas*, 441 U.S. 418 (1979)	6, 12, 17-20
American Louisiana Pipeline Co. v. *FPC*, 344 F.2d 525 (D.C. Cir. 1965)	16
Antonia Garcia v. *Mendez*, No. R-68-151 (P.R. May 31, 1974)	11
Berrios v. *Mining Commission*, No. R-70-266 (P.R. May 6, 1974)	11
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930)	12, 13-14
Briscoe v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970)	13, 21, 22
Byrd v. *Blueridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958)	15
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	2
Carrington v. *Rash*, 380 U.S. 89 (1965)	21
Carrion v. *Treasurer of Puerto Rico*, 79 P.R.R. 350 (1956)	11
Dunn v. *Blumstein*, 405 U.S. 330 (1972)	21
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963)	13
Fountain v. *Wilson*, 336 U.S. 681 (1949)	15
Georgia Railway & Electric Co. v. *Decatur*, 295 U.S. 165 (1935)	13
Griffin v. *Burns*, 570 F.2d 1065 (1st Cir. 1978)	22
Hatch v. *FERC*, No. 80-1561 (D.C. Cir. June 26, 1981)	15-16
Hill v. *FPC*, 335 F.2d 355 (5th Cir. 1964)	16
Kusper v. *Pontikes*, 414 U.S. 51 (1973)	21
Martinez v. *Superior Court*, 83 P.R.R. 691 (1961)	12
Molina v. *Barreto Perez*, No. 0-80-713 (P.R. Dec. 24, 1980)	6

Table of Authorities Continued

Page

Partido Nuevo Progresista v. *Perez*, No. 80-1540 (Petition for Certiorari Denied, May 18, 1981) 5

Pettengill v. *Putnam County R-1 School District*, 472 F.2d 121 (8th Cir. 1973) 22

Powell v. *Power*, 436 F.2d 84 (2d Cir. 1970) 22

Reynolds v. *Sims*, 377 U.S. 533 (1964) 13

Saunders v. *Shaw*, 244 U.S. 317 (1917) 13

Shelly v. *Kramer*, 334 U.S. 1 (1948) 12

Snowden v. *Hughes*, 321 U.S. 1 (1944) 12-13, 21

West Ohio Gas Co. v. *Public Utilities Commission*, 294 U.S. 63 (1935) 14-15

Williams v. *Rhodes*, 393 U.S. 23 (1968) 21

Williams v. *Sclafani*, 444 F. Supp. 906 (S.D.N.Y.), *aff'd mem. sub. nom. Williams* v. *Velez*, 580 F.2d 1046 (2d Cir. 1978) 22

CONSTITUTIONAL PROVISIONS

Due Process Clause, Fifth and Fourteenth Amendments ..... *passim*

Equal Protection Clause, Fourteenth Amendment ... 21, 22

First Amendment 21

STATUTES

28 U.S.C. § 1258(3) 2

Act No. 4, Dec. 20, 1977, as amended by Act. No. 3, Sept. 8, 1980 4

Evidence Rule 10(F), 5 L.P.R.A. App. IV R.10(F) ... 6, 11

16 L.P.R.A. § 3013(e) 5

16 L.P.R.A. § 3022(6) 6

16 L.P.R.A. § 3023 6

Table of Authorities Continued

Page

16 L.P.R.A. § 3024 9
16 L.P.R.A. § 3033(b) 5
16 L.P.R.A. § 3057 5
16 L.P.R.A. § 3218 19
16 L.P.R.A. § 3234 ..... 3-4, 5, 19
16 L.P.R.A. § 3263 6
16 L.P.R.A. § 3376 20
32 L.P.R.A. § 1679 11

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OSVALDO MOLINA, *Petitioner*[1]

v.

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

Osvaldo Molina, candidate of the New Progressive Party for Commonwealth Representative from District 35, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Puerto Rico entered in this case on June 23, 1981.

OPINIONS BELOW

The majority opinion of the Supreme Court of Puerto Rico and the concurring and dissenting opinions of Justices Negron Garcia and Martin, respectively, not yet officially reported, are printed as

[1] In addition to the parties listed in the caption here, Gerineldo Barreto Perez, General Administrator of Elections, was a party to the proceeding below.

Appendix A, *infra*. Pertinent portions of the opinion of the Electoral Review Board, not reported, are printed as Appendix B, *infra*.

JURISDICTION

The judgment of the Supreme Court of Puerto Rico was rendered on June 23, 1981. (Appendix C, *infra*). A motion for reconsideration was timely filed on July 7, 1981 (Appendix D, *infra*) and was denied on July 28, 1981 (Appendix E, *infra*). A motion for stay of the mandate pending petition for writ of certiorari was timely filed on July 31, 1981. On August 4, 1981 the Supreme Court of Puerto Rico entered an order staying issuance of its mandate for thirty days, to and including September 3, 1981, to permit the filing of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1258(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has held that the demands of due process apply to Puerto Rico, but has found it unnecessary to rule whether the Due Process Clause of the Fifth Amendment ("No person shall . . . be deprived of life, liberty, or property, without due process of law") or the Due Process Clause of the Fourteenth Amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law") is the applicable provision. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n.5 (1974).

This case implicates federal due process requirements as well as numerous articles of the Puerto Rico Electoral Law. The text of these provisions is set out as Appendix F, *infra*.

STATEMENT OF THE CASE

On November 4, 1980 Puerto Ricans went to the polls in what proved to be the closest election in the history of Puerto Rico. The Popular Democratic Party ("PDP") gubernatorial challenger, Raphael Hernandez Colon, was initially declared the winner by 725 votes based on early, incomplete, and unofficial returns. (10a, *infra*). After a ballot-by-ballot recount, the incumbent New Progressive Party ("NPP") gubernatorial candidate, Carlos Romero Barcelo, was officially certified the winner by a margin of 3,434 votes out of over 1.6 million votes cast. (13a, *infra*).

The battle for control of the legislative branch was equally close. The PDP gained control of the Senate by a three-seat margin, 15 to 12. By late June of 1981, following the recount and final judicial resolution of most challenges, the PDP and NPP each appeared to hold 25 seats in the House of Representatives. (*Id.*) Control of the House will thus apparently depend on which party's candidate wins the District 35 race here at issue. (*Id.*)

The 1980 general elections were conducted pursuant to Puerto Rico's new Electoral Law, enacted on December 20, 1977. *See* 16 L.P.R.A. § 3001 *et seq.* (1979). Article 5.034 of the 1977 Act, 16 L.P.R.A. § 3234, specifies the procedure for challenging a ballot cast by any voter:

> "Any voter or inspector who has good reason to believe that a voter who has come to vote is doing so illegally, or has already voted in another polling place or precinct, may challenge his vote for the reason that made it illegal, pursuant to the provisions of this subtitle, but such challenge shall not prevent the person from voting. The ballot of

> every voter whose vote is challenged must be marked with the word "challenged" on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge, the elector's identification card number of the person affected, the municipality, precinct and number of the polling place. The challenged voter must sign the challenge, denying it, under oath, but if he does not deny it, his vote shall not be counted and shall be null and void. The Administrator shall send to each polling place printed and prepasted forms for challenges to be adhered to the challenged ballot. The form shall contain the basis for the challenge and the voter's oath for his signature."

The "printed and prepasted forms for challenges" required by the quoted provision were discarded by a subsequent amendment requiring only that the Administrator of Elections send to each polling place "a sample challenged ballot to show the Polling Place Board how to fill out a challenge." Act No. 4, Dec. 20, 1977, as amended by Act No. 3, Sept. 8, 1980. (*See* 154a-55a, *infra.*) Neither the Electoral Law nor the implementing regulations shed any more light on the proper form of the challenge. (155a, *infra*). "It was thus incumbent upon the Polling Place Board to guide and supervise the challenge process so that it could be effective." (*Id.*) Apparently some or all of these Boards in District 35 failed to advise that challengers, in addition to writing down their names, should sign their challenges at the bottom. (*Id.*)

In District 35, consisting of the precincts of Rio Grande, Luquillo, Fajardo, Culebra, Vieques, and part of Cieba (12a, *infra*), all in the Northeastern tip of

the Island, there were many challenges, most grounded on allegations that the voter did not maintain his domicile or legal residence in that district. *See* Article 2.007, 16 L.P.R.A. § 3057 (5f, *infra*). A number of the challenged votes were defended on the basis of procedural irregularities in the challenge procedure, generally a failure of the challenger to subscribe his signature under the written challenge.[2] *See* Article 5.034, 16 L.P.R.A. § 3234 (8f, *infra*).

The Electoral Law provides that challenged ballots are initially counted but may be annulled by the State Electoral Commission ("Commission") if it "be established that a challenged ballot was voted by a person or voter with no right to vote in said election." Article 6.003, 16 L.P.R.A. § 3263; *and see* 16 L.P.R.A. § 3013 (e). After the Commission's ballot-by-ballot recount, the NPP candidate, petitioner Osvaldo Molina, was ahead by five votes out of more than 45,000 votes cast. (12a, *infra*).[3]

---

[2] "The ballots rejected because of the absence of the contestant's signature essentially state the following: 'I, John Doe, challenge voter Richard Roe, because he does not reside in precinct X.' Even though the name of the contestant is not at the foot of the note including the challenge, it is in his own handwriting and under his name and responsibility that he states the reason for the challenge." (154a, *infra*).

[3] This tally included a number of ballots marked outside the designated square but counted in favor of respondent Cepeda, the PDP candidate. The Puerto Rico Electoral Law rather clearly provided that these outsquare ballots should not be counted. *See* Article 1.033, 16 L.P.R.A. § 3033(b). However, the Puerto Rico Supreme Court held to the contrary, and this Court ultimately declined to upset the result of that holding. *See* Partido Nuevo Progresista v. Perez, No. 80-1540 (Petition for Certiorari Denied, May 18, 1981).

Pursuant to Article 1.023, 16 L.P.R.A. § 3023, the respondent PDP and its candidate, respondent Samuel Cepeda, appealed to the Electoral Review Board ("Board") the Commission's adjudication of sixty ballots to petitioner Molina. Petitioner cross-appealed the adjudication of 53 other challenged ballots to respondent Cepeda. (140a, *infra*).[4]

Almost immediately the PDP filed a motion with the Supreme Court of Puerto Rico to disqualify the Board from conducting hearings concerning the 113 ballot challenges in District 35. The PDP asserted that under Article 6.003 of the Electoral Law, 16 L.P.R.A. § 3263 (9f, *infra*), only the Commission is empowered to conduct hearings on challenged ballots. In an opinion issued December 24, 1980 the supreme court confirmed the Board's authority to conduct hearings on the challenged ballots and set out certain general procedures for the conduct of ballot challenge hearings. *Molina* v. *Barreto Perez*, No. 0-80-713 (P.R. Dec. 24, 1980) (Appendix G, *infra*). Significantly, nowhere in that opinion is there any mention of an extraordinary or unusual standard of proof.

At the hearings, the PDP moved orally to have the Board apply the "clear and convincing evidence" standard of proof specified in *Addington* v. *Texas*, 441 U.S. 418 (1979), to the ballot challenges before it. (*E.g.*, Appendix H, *infra*.) Relying on Evidence Rule 10(F)[5] and the supreme court's silence on the standard

---

[4] One of the Board's functions is to "investigate and resolve any appealed resolution, determination, or order of the Electoral Commission." 16 L.P.R.A. § 3022(6) (3f, *infra*).

[5] That rule provides: "In civil cases, the trier's decision shall be in accordance with the preponderance of evidence." 5 L.P.R.A. App. IV R. 10(F) (150a, *infra*).

of proof, the Board denied the PDP's motions and announced its intention to apply the usual preponderance of evidence standard. (*Id.*)

The court's Christmas Eve order gave the Board seven days (or until New Year's Eve 1980) to summon witnesses, hear evidence, receive briefs, and write its opinion covering the 113 cases. (*See* 141a, *infra.*) Not surprisingly, on December 29 the Board asked for more time, pleading that it would take "several weeks," assuming only two hours per case, to hear and decide the 113 cases. (141a-42a, *infra*). The supreme court allowed the Board 15 additional days. (142a, *infra*). The majority opinion of the Puerto Rico Supreme Court noted that

> "[t]he hearings [before the Board] were held on work days, and holidays, at hours many times running very late into the night, and often irregularly because of the difficulty in summoning witnesses, cases had to be fractioned and the order of the evidence constantly altered." (13a, *infra*) (footnote omitted).

All parties recognized that the procedures before the Board, conducted at a frantic pace, were chaotic. (*See generally* 142a-44a, *infra.*)

On January 7, 1981—just two days before completion of the Board's hearings—the PDP filed a motion with the Puerto Rico Supreme Court requesting an order requiring immediate transcription and sequestration of the hearing record. In that motion the PDP urged again that a clear and convincing evidence test should be applied in deciding the District 35 ballot challenges. The NPP opposed that motion on January 9, and the supreme court never ruled on it. The Board's

hearings were concluded at 1:00 a.m. on January 10, 1981.

On January 14, 1981 the Board delivered itself of a 198-page opinion adjudicating each of the 113 challenged votes. The Board specifically adopted "those norms of the Rules of Evidence, particularly the ones relative to the weight of the proof . . . that would facilitate the course of the administrative process." (24b, *infra*). Its opinion made clear that the standard thus adopted was "the preponderance of evidence." (24b-25b, *infra*). In nine instances the Board ruled on the merits of challenges lacking a signature at the end of the challenge. (156a, *infra*). After amending resolutions of January 16 and 21, 1981, the net result of the Board's action, annulling votes which had been cast both for respondent Cepeda and for petitioner Molina, was to establish a margin of 23 votes for petitioner. (13a, *infra*).

Respondents appealed 40 of the 113 cases to the Puerto Rico Supreme Court, alleging, *inter alia*, erroneous application of the preponderance of evidence standard and erroneous adjudication on their merits of challenges lacking subscribed signatures. Petitioner controverted those assertions.

The Puerto Rico Supreme Court handed down its decision on June 23, 1981. Justice Davila disqualified himself. Five of the remaining seven Justices filed a 125-page majority opinion, authored by Justice Irizarry Yunque. Justice Negron Garcia filed a separate concurring opinion; Justice Martin filed a dissenting opinion. The majority held, in a landmark exposition of Puerto Rico's Electoral Law, that the evidence required to annul a challenged vote must be "clear,

strong, and convincing," not merely preponderant. The court recognized that the standard of proof it specified was "more stringent than the mere preponderance of evidence." (18a, *infra*). Nonetheless—unexpectedly, and contrary to dissenting Justice Martin's suggestion (151a-53a, *infra*)—the majority refused to remand for a new trial in accordance with the new standards of evidence that had been prescribed: "[I]t is our duty to reevaluate the evidence pursuant to the correct standards and make such findings as are proper." (22a, *infra*). The majority also held that the absence of a subscribed signature invalidated nine of the challenges, eight of them challenges to PDP votes. (25a-28a, 94a-95a, *infra; and see* 153a-56a, *infra*.)

Applying these principles—without deference either to the Board's fact findings or to its conclusions of law[6]—the majority proceeded to conduct a *de novo* review of the evidence concerning each challenged vote. It annulled six votes adjudicated by the Board for petitioner Molina and overruled the Board's annulment of 26 other votes that had been cast for respondent Cepeda. In so holding the majority reversed the outcome of the election, awarding it to respondent Cepeda by a margin of nine votes and declaring him "House Representative-Elect" from District 35, thus swinging control of the Puerto Rico House of Representatives from the NPP to the PDP.

The dissenting opinion of Justice Martin urged that the court order a new election, asserting that neither

---

[6] The Electoral Law provides that "[t]he findings of fact of the Board shall be final," although its conclusions of law are subject to review by the Puerto Rico Supreme Court. 16 L.P.R.A. § 3024 (3f, *infra*).

the Board's decision nor the court's judgment guarantees "the legitimacy of the victory margins." (138a, *infra*). The dissent vigorously assailed the new and stricter standard of proof announced by the majority, noting that it is unprecedented either in Puerto Rico or federal electoral jurisprudence, and urging that, if such a standard is imposed, due process requires a remand so that the parties have an opportunity to file evidence complying with the new standard. (152a-53a, *infra*). Finally, Justice Martin attacked the majority's refusal to adjudicate, on their merits, the nine challenges lacking subscribed signatures. (157a, *infra*). He asserted that the court's holding in this regard denied the constitutional right against dilution of the contestant's vote. (*Id.*)

Petitioners timely moved for reconsideration on July 7, 1981, alleging violations of the Fifth and Fourteenth Amendments to the United States Constitution in the adoption of the "clear, strong and convincing evidence" standard and in the majority's refusal to remand for a new trial. (1d-3d, *infra*). The petition also alleged a due process violation (through dilution of the challengers' votes) in the majority's refusal to adjudicate those challenges lacking subscribed signatures. (3d, 16d, *infra*).

The motion for reconsideration was denied without opinion on July 28, 1981, with Justice Martin again dissenting and Justices Davila and Trias Monge not participating.

REASONS FOR GRANTING THE WRIT

I. The Puerto Rico Supreme Court's Failure to Remand for the Submission of Additional Evidence in Light of the New and Stricter Standard of Proof It Specified Denied Petitioner Due Process of Law and Conflicted with Pertinent Holdings of this Court and of the Federal Courts of Appeals.

The Puerto Rico Supreme Court's holding that the "clear, strong and convincing" standard must be applied to electoral ballot contests represents a radical change in the standard of proof that could not have been foreseen by the parties. Since 1933 the Puerto Rico Civil Code has specified that "[i]n civil cases . . . the decision must be made according to the preponderance of proof." 32 L.P.R.A. § 1679. The 1979 Rules of Evidence contain a similar provision: "In civil cases, the trier's decision shall be in accordance with the preponderance of evidence." 32 L.P.R.A. App. IV R.10(F) (150a, *infra*). The Puerto Rico Supreme Court has held that this standard is applicable to "any" civil case. *Carrion* v. *Treasurer of Puerto Rico*, 79 P.R.R. 350, 360 (1956). In fact, contrary to the court's opinion in this case (18a n.21, *infra*), it now applies "the general rule requiring preponderance of evidence" in fraud cases. *Antonia Garcia* v. *Mendez*, No. R-68-151 (P.R. May 31, 1974) (Appendix I, *infra*) ("always, in one case or the other, the fact should be established with preponderance of evidence"). The code and rules of civil procedure have been customarily applied to administrative proceedings in Puerto Rico. *Berrios* v. *Mining Commission*, No. R-70-266 (P.R. May 6, 1974) (Appendix J, *infra*); *Martinez* v. *Superior Court*, 83 P.R.R. 691, 696 (1961).

No reported case had ever suggested that any different or higher standard of proof is required in Puerto Rico election cases. In fact, in its December 24, 1980 opinion specifically authorizing the Electoral Review Board to conduct the hearings in this case and directing "full adjudication . . . surrounded by the minimum constitutional rights of the due process of law, such as the notification of the elector, summoning of the witnesses, and filing and evaluation of the evidence, (4g, *infra*), the Puerto Rico Supreme Court conspicuously failed to specify any different standard of proof than is applied in ordinary civil and administrative cases.

With no judicial instruction to the contrary, the parties justifiably assumed and the Board expressly applied (24b-25b, *infra;* Appendix H, *infra*) the preponderance of evidence standard in developing and evaluating the record below. The Puerto Rico court's holding that a stricter standard is required and its application of that new standard to the existing record of this case without remand so that petitioner might comply with the new standard of proof effectively denied petitioner notice and a meaningful opportunity to be heard, in violation of his federal constitutional right to due process of law[7] and in direct conflict with

---

[7] Neither respondents nor the Puerto Rico court disputes the applicability of federal due process guarantees to this case. The Puerto Rico Supreme Court held on December 24, 1980 that the hearings below must be conducted in accord with "minimum constitutional rights of the due process of law." (4g, *infra*). And both respondents and the Puerto Rico court have justified application of the clear and convincing standard of proof on grounds of federal due process as enunciated in Addington v. Texas, 441 U.S. 418 (1979). It is clear that State action is present in the decision of the Puerto Rico Supreme Court. Shelley v. Kramer, 334 U.S. 1, 14 (1948); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.

applicable precedents of this Court and of the circuit courts of appeals.

In *Saunders* v. *Shaw*, 244 U.S. 317 (1917), this Court was presented with a strikingly similar situation. Plaintiffs sought an injunction against collection of a drainage tax, offering evidence to show that their land would not be benefited by the tax. On defendant's objection, the evidence was excluded, but was proffered by plaintiff. Judgment for defendant was affirmed on appeal by the state supreme court. On rehearing, however, the court reversed on the basis of plaintiff's proffered evidence that his land would not be benefited by the tax. Defendant sought review in this Court, alleging a deprivation of due process because the case had been decided against him without any opportunity to present evidence rebutting plaintiff's showing of no benefit. In an opinion by Mr. Justice Holmes the Court held that defendant had been deprived of due process in violation of the Fourteenth Amendment. *Id.* at 319.[8]

In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), Justice Brandeis elaborated on

---

673, 682 (1930). And a decision that annuls some votes and dilutes others in such a manner as to reverse the outcome of an election and swing control of the Puerto Rico House of Representatives from one party to another clearly implicates at least the liberty interests of voters in having their votes counted or not diluted as the case may be, *see* Reynolds v. Sims, 377 U.S. 533, 554-55 (1964), and of the candidates in seeking public office, *see* Briscoe v. Kusper, 435 F.2d 1046, 1054-56 (7th Cir. 1970). This Court's holding in Snowden v. Hughes, 321 U.S. 1 (1944), should not be an obstacle to that conclusion. *See* note 14 *infra*.

[8] *See also* Georgia Ry. & Electric Co. v. Decatur, 295 U.S. 165, 171 (1935); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 156 (1963).

the theory that had been cryptically applied in *Saunders*. In *Brinkerhoff*, plaintiffs sought to enjoin collection of certain taxes on the ground that they were discriminatory. A prior decision of the state supreme court had held that such relief could not be provided by the State Tax Commission. On appeal in *Brinkerhoff* the state supreme court overruled its earlier holding and rendered judgment for defendant on the ground that plaintiff had an adequate remedy before the State Tax Commission and was therefore not entitled to equitable relief. By this time, however, it was too late for plaintiff to avail itself of the remedy before the Tax Commission.

This Court reversed, explaining that "the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense." *Id.* at 678. The Court explained that its concern was "with the question whether the plaintiff has been accorded due process in the primary sense." *Id.* at 681. Acknowledging that the state court had unquestioned power to construe the relevant state statute and to reexamine and overrule its prior holding, the Court emphasized that the state "must, in so doing, accord the parties due process of law." *Id.* at 683. In other words:

> "[A] state may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* (footnote omitted).

Even closer to this case is *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63, 69-71 (1935), where a gas rate case was tried on the assumption that

a particular procedure for allocating distribution expenses was to be applied but where, after the hearings had concluded, the Commission announced and applied a new and inconsistent rule for allocating such costs. This Court reversed, holding that "the fundamentals of a fair hearing were not conceded to the company," *id.* at 70, and that "[t]he Fourteenth Amendment condemns such methods and defeats them," *id.* at 71.[9]

In *Hatch* v. *FERC*, No. 80-1561 (D.C. Cir. June 26, 1981), the United States Court of Appeals for the D.C. Circuit recently confronted a similar problem. In denying approval of certain interlocking directorates the Commission reversed forty years of precedent by specifying that such interlocks would be authorized only on an affirmative showing of public benefit. The previous rule, under which the case was tried, required only the absence of evidence that the interlock would result in adverse effects. The D.C. Circuit reversed, holding that "notice and opportunity to meet the new standard is a constitutional imperative of due process." *Id.*, slip op. at 22. The court distinguished cases where an agency merely revises the legal significance of the same kinds of facts, noting that "when, as here, the change is a qualitative one *in the nature of the burden of proof* so that additional facts of a different kind may now be relevant for the first time, litigants must

---

[9] *See also* Fountain v. Filson, 336 U.S. 681, 683 (1949) (appellate disposition of the case "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" deprives such party of "any opportunity to remedy the defect which the appellate court discovered in his case"); Byrd v. Blueridge Rural Electric Cooperative, Inc., 356 U.S. 525, 532-33 (1958) (same).

have a meaningful opportunity to submit conforming proof." *Id.* at 22-23 (emphasis added).[10]

It is hard to imagine a more egregious violation of procedural due process in the electoral context than occurred here. As the dissent noted, a party in litigation uses the standard of proof as a guide to the amount of evidence that must be submitted to prove a claim. (152a, *infra*). Especially was this so here, where the frenzied pace and drastically abbreviated schedule of hearings made it impractical if not impossible for petitioner to present any more evidence than needed to satisfy the preponderance standard which he thought was applicable. The Puerto Rico court's specification of a stricter standard of proof, unforeseen and unforeseeable by the parties,[11] expressly altered the adjudication of three ballots (see 71a-76a, *infra*) and appears to have changed the result in several other cases (*e.g.*, 92a-94a, *infra*). The court's judgment reversed the out-

---

[10] *See also Hill v. FPC*, 335 F.2d 355, 362 (5th Cir. 1964) ("the Commission deprived producers of a fair and adequate hearing because the standards to be applied were neither evolved nor announced until the decision holding them unsatisfied"); American Louisiana Pipeline Co. v. FPC, 344 F.2d 525, 528 (D.C. Cir. 1965) (where the Commission specified a new rate standard on appeal, without notice to petitioner, "[f]airness . . . require[d] that it be given an opportunity to address itself" to the new standard).

[11] Though oral motions were made to the Board and briefs were filed in the supreme court on this issue (see pp. 6-8, *supra*), the Board denied those motions, relying on general rules of evidence, and the supreme court never even suggested that any stricter standard was applicable until its dispositive opinion on June 23, 1981. Thus neither of the parties had any reason to believe that a new standard would, in fact, be specified. *See* Hatch v. FERC, slip op. at 24-25.

come of the election and swung control of the House from one political party to another.

Petitioner promptly filed an application for rehearing, urging that the case be remanded for additional hearings pursuant to the new standard of proof. The petition was denied. The result was a denial of any opportunity to satisfy the new standard, in clear violation of petitioner's federal due process rights.[12]

II. The Puerto Rico Supreme Court Acted Contrary to this Court's Decisions When It Ruled that Under the Due Process Clause, Challenges to the Validity of Election Ballots Must Be Proven by More than a Preponderance of the Evidence.

In *Addington* v. *Texas*, 441 U.S. 418 (1979), this Court held that the Due Process Clause requires the state to satisfy a standard of proof more exacting than the "preponderance of the evidence" standard in civil commitment proceedings. The Court noted that the harm to the individual from an erroneous adverse decision in such proceedings is "significantly greater" than the harm to the state from an erroneous decision adverse to it. *Id.* at 425-27. Accordingly, the Court concluded that the standard of proof, which "allocate[s] the risk of error between the litigants," *id.* at 423, must be weighted in favor of the indi-

[12] The court's refusal to remand also violates due process in its assumption of the trial court's role of assessing the evidence. As the dissenting Justice noted:

> "[I]t is impossible for this Court, even if it could reweigh the evidence, to determine if the same is clear, strong and convincing to sustain a specific fact if it only comes forth that the Board found preponderance of evidence of the occurrence of that fact, without there being any indication [in the Board opinion] as to what specific evidence was considered and which was rejected." (152a, *infra*).

vidual. Thus the preponderance standard, which requires litigants to "share the risk of error in roughly equal fashion," *id.*, was deemed to "fall[] short of meeting the demands of due process," *id.* at 431. Instead, due process was held to require the state to justify confinement by "clear and convincing evidence." *Id.* at 431-33.

The Puerto Rico Supreme Court purported to follow the dictates of *Addington* in this case. Focusing narrowly on the "right to vote" of the persons whose ballots were challenged, the court ruled that "due process of law requires" persons challenging the validity of electoral ballots to prove their case by "clear, strong, and convincing evidence." (16a-22a, *infra*). The court's due process holding, unprecedented in Puerto Rico or federal law, is inconsistent with applicable decisions of this Court.

In the first place, the due process analysis in *Addington* does not support the Puerto Rico Supreme Court's imposition of a standard of proof more demanding than a preponderance of the evidence. A civil commitment proceeding, like a criminal trial, presents a direct confrontation between the power of the state and the freedom of the individual seeking to avoid confinement. In such cases, requiring the state to meet a standard of proof exceeding a preponderance of the evidence may be necessary to reach "a fair balance between the rights of the individual and the legitimate concerns of the state." *Addington* v. *Texas*, 441 U.S. at 431. Ballot challenge proceedings, on the other hand, are not confrontations between citizen and state; they are, instead, contests ***between citizens*** and the political parties with which

they have associated.[13] Arrayed on *both* sides of such disputes are individuals seeking to protect their voting rights (either from wrongful annulment on the one hand or from wrongful dilution by invalid ballots on the other), their own candidacies (as is the case with petitioner and respondent Cepeda), and the well-being of their political parties. The interests of each side, and the potential harm to each arising from an erroneous adverse decision, cannot be viewed as so significantly imbalanced that due process, as amplified in *Addington*, compels the application of a stringent standard of proof to ballot challenges. The court below thus misread *Addington* when it considered only the interests of the challenged voter. As is vividly demonstrated in this case, in which two political parties are vying for control of the Puerto Rico House of Representatives, ballot contests affect the interests of both challenging and challenged voters and their respective parties and candidates in roughly equal measure.

In view of these considerations, petitioner submits that the reasoning in *Addington* does not merely fail to require a "clear and convincing evidence" stand-

---

[13] As the Puerto Rico Supreme Court acknowledged repeatedly in its discussion of the disputed ballots, the challenges were deemed to be lodged by the political parties themselves against ballots voted in favor of the candidate of the opposing party. (65a, 69a, 83a, 103a, *infra*). The challenges were in fact signed by voters or by polling inspectors, who by statute are appointed by the parties or candidates participating in the election. *See* 16 L.P.R.A. §§ 3218, 3234. (6f-8f, *infra*). (*E.g.*, 77a, 83a, 90a, 103a, *infra*.)

Ballot contest proceedings must be distinguished from proceedings instituted by the state for electoral offenses such as double voting or voting without the right to do so. *See* 16 L.P.R.A. § 3376.

ard of proof in this case; it affirmatively proscribes the imposition of such a standard. The fundamental premise of *Addington* was that litigants advancing interests protected under the Due Process Clause must not be subjected to standards of proof that fail to strike a "fair balance" in allocating the risk of error between adversaries. *See* 441 U.S. at 431. In *Addington*, the preponderance standard was held to be fundamentally unfair to the appellant because it required him to "share the risk of error" with his adversary "in roughly equal fashion." *Id.* at 423, 427. In this case, unlike the situation in *Addington*, the contending interests are roughly if not exactly equal. Accordingly, it is fundamentally unfair to require the challenger to shoulder the disproportionately *greater* risk of error imposed by the clear, strong, and convincing standard. The Puerto Rico Supreme Court has decreed, however, that such a disproportionate risk of error must be borne by voters seeking to avoid the dilution of their voting rights caused by the counting of illegal ballots and, correspondingly, must be borne by candidates seeking to avoid a denial of public office on the same grounds. Thus, the decision below is not simply unsupported by *Addington;* it is in direct conflict with *Addington*'s analysis.

III. The Puerto Rico Supreme Court's Decision, Including Its Unforeseeably Restrictive Ruling on the Technical Requirements for Challenging Ballots, Raises the Important Question Whether the Due Process Clause Protects Candidates for Public Office Against the Denial of a Fundamentally Fair Election.

The Puerto Rico Supreme Court's disposition of respondents' appeal from the Electoral Review Board raises a recurring issue of manifest public importance

—whether a candidate for public office has a due process right to a fundamentally fair election.

In the past two decades, the right to participate in the electoral process has received increasing constitutional protection under the Equal Protection Clause, *see, e.g., Dunn* v. *Blumstein*, 405 U.S. 330 (1972), and the First Amendment, *see, e.g., Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Under this Court's decisions, the constitutional rights of voters, *see, e.g., Carrington* v. *Rash*, 380 U.S. 89 (1965), and of candidates and political parties, *see, e.g., Williams* v. *Rhodes*, 393 U.S. 23 (1968), to take part in elections have prevailed over restrictive state electoral laws. During this period, however, the Court has not considered whether the Due Process Clause places any constraints on the manner in which states *administer* their electoral laws. Consequently, this Court has not recently explored the role of the Due Process Clause, the Constitution's ultimate guarantee of fairness, in the actual operation of the electoral process.[14]

---

[14] The Court last addressed this issue in Snowden v. Hughes, 321 U.S. 1, 7 (1944), and stated that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause." In fact, however, *Snowden* may be read as *holding* only that an allegation that official action is unlawful under state law, standing alone, does not support a claim that federal due process has been denied.

Several federal courts have concluded that the due process holding of *Snowden v. Hughes* has been eroded by the Court's later electoral decisions and is no longer an obstacle to due process challenges to the administration of state electoral laws. *See, e.g.*, Briscoe v. Kusper, 435 F.2d 1046, 1052-53 (7th Cir. 1970). To the extent *Snowden* is viewed as holding that candidates for state office are without federal due process rights, it should be overruled.

The lower federal courts have, nonetheless, confronted this issue on several occasions, in some cases finding that the rulings of state authorities, including the state's judiciary, have deprived candidates or voters of a fundamentally fair election in violation of the Due Process Clause.[15] A common feature of such due process violations has been an unforeseeable interpretation of electoral laws that, owing to its inherent retroactive impact, has deprived voters or candidates of a fair opportunity to exercise their electoral rights. *See, e.g., Briscoe* **v.** ***Kusper,*** **435 F.2d 1046, 1054-56** (7th Cir. 1970) (application of novel "rigid and technical interpretation" on validity of nominating petition signatures held "unfair" and a violation of due process).

The decision of the Puerto Rico Supreme Court in this case has such an unfair effect. The court's refusal to remand the case, which deprived petitioner of an op-

---

[15] *See* Griffin v. Burns, 570 F.2d 1065, 1075-79 (1st Cir. 1978) (class action by voters whose absentee and shut-in ballots were invalidated by post-election state court ruling placing novel interpretation on state electoral statute); Briscoe v. Kusper, 435 F.2d 1046, 1054-56 (7th Cir. 1970) (class action by candidates and voters based on rulings by election board applying new, restrictive standards to validity of nominating petition signatures); Williams v. Sclafani, 444 F. Supp. 906, 910-14, (S.D.N.Y.) (suit by candidate and voters based on change in official interpretation, confirmed by state court ruling, regarding validity of nominating petition signatures under state electoral law), *aff'd mem. sub nom.* Williams v. Velez, 580 F.2d 1046 (2d Cir. 1978).

In other cases, due process challenges to the administration of electoral laws have been rejected. *See, e.g.,* Pettengill v. Putnam County R-1 School District, 472 F.2d 121, 122 (8th Cir. 1973) (per curiam) (voters' challenge to counting of illegal ballots as denial of right to fair election); Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970) (voters' due process and equal protection challenge to counting of illegal ballots).

portunity to substantiate the challenges to ballots cast for respondent Cepeda under the court's novel standard of proof (*see* pp. 11-17 *supra*), is one example of this unfairness. Another is the court's ruling that ballot challenges are a legal nullity unless the challenger's signature is placed at the *end* of the challenge instead of in the *body* of the challenge.[16] (25a-27a, 94a-95a, *infra*). The statutory provision governing challenges does not require that holding. (8f, *infra*). And, at least in District 35, challengers were not generally apprised of any such requirement. (155a, *infra*). Clearly, if challengers had been aware of such a technicality when their challenges were made at the polling place, they could and would have complied, thereby preserving their opportunity to protect their vote from dilution caused by the counting of illegal ballots.

There can be little doubt that the Puerto Rico Supreme Court's rulings on these issues directly affected the outcome of the election in House District 35. The court's strict holding on challenge signatures nullified eight challenges to ballots cast for respondent Cepeda that the Electoral Review Board had upheld. (94a-95a, *infra*). Similarly, the court's *de novo* application of a stricter standard of proof on review apparently formed the basis of the court's reversal of several other Board decisions in petitioner's favor. (*See* 73a-76a, 92a-84a, *infra*.) Accordingly, respondent Cepeda's nine-vote margin of victory after the court's decision must be attributed to the retroactive effect of the Puerto Rico Supreme Court's novel rulings. Under these circumstances, it cannot be said that Puerto Rico's electoral laws have been applied so as to afford petitioner a fair election.

---

[16] *See* pp. 3-4, 9, 10 *supra*.

CONCLUSION

The June 23, 1981 decision of the Puerto Rico Supreme Court, a landmark exposition of Puerto Rico's Electoral Law that reversed the outcome of a key legislative race and swung control of the Puerto Rico House of Representatives from one party to another, deprived petitioner of both substantive and procedural rights guaranteed by federal due process. In several respects that decision is inconsistent with the holdings of this Court and of the federal courts of appeals. This Court should grant certiorari to vindicate petitioner's federal constitutional rights and clarify important unresolved issues concerning the impact of federal constitutional guarantees on state elections.

Respectfully submitted,

Of Counsel:

HECTOR M. LAFFITTE
Chase Manhattan Bank Bldg.
Hato Rey, Puerto Rico 00918

ANTONIO CORDOVA
Bank of San Juan Tower
San Juan, Puerto Rico 00901

MICHAEL J. HENKE
Counsel of Record

JOHN D. TAURMAN
ANN M. ASHTON
VINSON & ELKINS
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-6500

Counsel for Petitioner
Osvaldo Molina

September 2, 1981

APPENDIX

APPENDICES

A. Opinion of the Supreme Court of Puerto Rico (June 23, 1981)*

B. Excerpts from the Opinion of the Electoral Review Board (January 14, 1981)

C. Judgment of the Supreme Court of Puerto Rico (June 23, 1981)*

D. Petitioner Molina's Motion for Reconsideration (July 7, 1981)*

E. Resolution of the Supreme Court of Puerto Rico (July 28, 1981)

F. Excerpts from the Puerto Rico Electoral Law, Act of December 20, 1977, as Amended to November 4, 1980

G. Opinion and Judgment of the Supreme Court of Puerto Rico (December 24, 1980); Resolution of the Supreme Court of Puerto Rico (December 30, 1980)

H. Excerpts from the Transcript for Hearing held on January 4, 1981 Before the Electoral Review Board

I. Antonia Garcia v. Mendez, No. R-68-151 (P.R. May 31, 1974)*

J. Berríos v. Mining Commission, No. R-70-266 (P.R. May 6, 1974)*

---

* Translation from Spanish to English certified by the Clerk of the Supreme Court of Puerto Rico.

APPENDIX A

IN THE SUPREME COURT OF PUERTO RICO

No. 0-81-27—Review

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Appellants*

v.

GERINELDO BARRETO PÉREZ, General Administrator of Elections, and OSVALDO MOLINA, *Appellees*

MR. JUSTICE IRIZZARRY YUNQUE delivered the opinion of the Court.

San Juan, Puerto Rico, June 23, 1981

The Popular Democratic Party and its candidate to the House of Representatives for District No. 35, Mr. Samuel Cepeda, have appealed before this Court seeking review of a resolution issued by the Electoral Review Board on January 14, 1981, as amended by resolutions of January 16 and 21, 1981, declaring Mr. Osvaldo Molina, member of the New Progressive Party, representative elect for said district. We ordered the transcript of all the testimonies given before the Board and, once said transcript was brought before our consideration,[1] we granted the parties the terms prescribed to file their respective briefs. The case was taken under advisement on May 1.

The issue raised before us is that the Electoral Review Board erred upon applying the wrong standards when it passed on the challenges of electors whose validity was contested. We agree that the standards used by the Board are not the most adequate nor are they in harmony with the fundamental constitutional rule which guarantees the expression of the will of the people by means of equal, direct and secret universal suffrage, and protects the citizen

[1] It has 6,413 pages.

against any coercion in the exercise of the electoral franchise.[2] We must outline—later on we shall discuss them *in extenso*—the standards that should be applied when scrutinizing any challenge to the voting rights of an elector. Said standards must be framed within the principle that the right to vote is the most precious prerogative of the people because it is through the vote that the people exercise their sovereign power and express their will. Bearing this fundamental principle in mind, we deem that the application of the following rules is essential:

(1) the validity of the vote cast by an elector is presumed;

(2) whoever challenges a vote has the burden of proving the facts under which he stands;

(3) the evidence to annul a vote must be clear, strong, and convincing;

(4) all challenges must strictly comply with the statutory requirements;

(5) the challenged elector shall be given ample opportunity to appear and defend the validity of his vote;

(6) when passing on a challenge none other than the grounds raised therein shall be considered;

(7) a vote shall not be annulled, nor its validity questioned, for errors for which the elector is not responsible;

(8) the domicile of an elector shall be determined pursuant to the rules laid down in the Electoral Law, always bearing in mind his *animus manendi* or his intention to remain there;

---

[2] "The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise." Constitution of the Commonwealth of Puerto Rico, Art. II (Bill of Rights), Sec. 2.

(9) the validity of an electoral ballot shall be upheld provided that the voter's intention be reasonably determined; and

(10) no physical handicap of an elector shall serve as a valid ground to deprive him of his right to vote.

In order to place in the proper perspective the issues raised herein, we shall discuss below the historical background and the grounds which gave rise to this appeal; we shall then set forth the judicial grounds of the rules outlined; and finally, on the basis of said standards and in consideration of the oral and documentary evidence, we shall analyze one by one the cases of the votes in controversy and adjudicate according to Law.

I

Historical Background and Facts

A. *Historical Background*

The history of the democratic process in Puerto Rico, that is to say, of the people's participation in the election of their government, has been brief and randomly learned. During the first four hundred years after the discovery, it was limited to sporadic electoral efforts for the selection of ordinary mayors and aldermen, and it was not until 1810 that the first general elections were held. From that moment until the establishment of the autonomous regime and the holding of the last elections under the Spanish flag on March 27, 1898, electoral events were occasionally held depending on the political ups and downs in the Spanish Metropolis which was beginning to awake, after many centuries, from its traditional absolutist monarchic regime.[3]

---

[3] See *P.S.P., P.P.D. y P.I.P.* v. *Romero Barceló*, 110 D.P.R. —— (1980), 80 J.T.S. 80, Mr. Justice Trías Monge, dissenting. Consult 1 Bolívar Pagán, *Historia de los partidos políticos puertorriqueños*, Librería Campos.

The "hundred days elections," so called because they were held throughout several voting days fixed separately from July 1899, when they began in Adjuntas, until January 1900, when they ended in Yauco,[4] and the first election under the Foraker Act held on November 6, 1900,[5] were the Puerto Rican people's first electoral experiences under the United States' flag. Elections began to be held regularly, at first every two years, and then every four years under the Jones Act and under the Commonwealth, giving rise to an ever-increasing development of the democratic participation of the people in the composition of the government and in its fundamental decisions. Although it is true that electoral events were still inflamed, there was a slow but firm evolution, and, with each experience, the Puerto Rican people acquired a profound and zealously well kept awareness of the value of the vote as its main weapon and cornerstone of the democratic system.

This evolution has become manifest both in its substantive and procedural aspects. Insofar as the substantive aspect is concerned, the right to vote was no longer the privilege of a few, but that of practically all adult persons. Barriers based on race and sex, the requirements to have property, to know how to read and write, and to have attained twenty-one years of age were restrictions of another era, which began to disappear until they were finally and permanently erradicated through the constitutional

---

[4] Said elections were so hard-fought and inflamed, due to the many clashes and bloody encounters, that Luis Muñoz Rivera called them the "hundred battles" elections. *Obras completas de Luis Muñoz Rivera (1890-1900)* 2 5 6, Madrid, 1925, Ed. Puerto Rico. A contemporary observer, when noting that the terrible hurricane San Ciriaco (August 8, 1899) coincided with the holding of said elections, said that "the fury of the storm was not stronger than the fury with which the two sides were fighting each other." Bolívar Pagán, *op. cit.* at 61.

[5] Bolívar Pagán, *op. cit.* at 73-75.

pronouncements which guarantee the right to universal, equal, and direct suffrage,[6] which reduced to eighteen years the age to be an elector, and which provide that no one shall be deprived of the right to vote for not knowing how to read or write or for not having property.[7]

In the procedural aspect, the evolution has been equally dynamic. The turbulent and often cruel controversies of old have made the way to quiet and safe climates, particularly against physical and economic coercion. The buying and selling of votes has become nothing more than a sad historical memory, overcome by a strong will to assert the value of the vote as a matter of self-respect and dignity. The Constitution expressly orders that the secretiveness of the vote be guaranteed and the citizen protected against any coercion in the exercise of the electoral franchise.[8] In keeping with this, the legislations promulgated throughout the years regarding electoral processes have set up guidelines to implement and protect the exercise of the electoral franchise and have provided penal sanctions to those who put obstacles in the way of or coerce the elector.[9] The concept of domicile has been liberalized by

---

[6] Art. II, Sec. 2, Constitution of the Commonwealth.

[7] Art. VI, Sec. 4 of the Constitution, as amended through a referendum held on November 1, 1970.

[8] Art. II, Sec. 2.

[9] See Electoral Code, adopted through Act No. 1 of February 13, 1974, art. 4-001 (voter's Bill of Rights), art. 7-018 (absentee votes), art. 7-056 (prohibition to arrest an elector before, during, or after voting), art. 7-078 (prohibition on disclosure of vote), and arts. 9-002 to 9-025 (electoral offenses), and 10-004 (obligatoriness of secret vote), (16 L.P.R.A. §§ 2131, 2348, 2386, 2408, 2501 to 2525, and 2554, respectively); and the Electoral Law in force, Act No. 4 of December 20, 1977, which repealed the above-mentioned Electoral Code but kept the guidelines and sanctions we have enumerated. See, particularly, art. 2.006 (guar-

eliminating the one-year residence requirement.[10] Strict procedures have also been established for the challenging of electors.[11]

From the general election held in November 1940, until that held in 1968, there was a period of what we could call political stability, in the sense that there were no changes in the political party in power. The 1968 elections brought about a period of changes every four years, and nobody can deny that recent political campaigns have also suffered an unfortunate change in the level of public debate. The development of radio and television, particularly of the latter, has allowed political campaigning to come right into the home, doing away with crowd confrontation. Advertisement techniques have been fully exploited through the use of audiovisual propaganda experts. Often demagogy and personalism have effectively made their way through such means. Uncontrolled aggression stirs the spirits already perturbed by the serious economic problems of our times. All this has made the Puerto Rican people restless and possibly suspicious.

---

antee of the right to vote and prohibition to arrest the elector), art. 5.040 (absentee votes), arts. 8.001 to 8.035 (electoral prohibitions and offenses), (16 L.P.R.A. §§ 3056, 3240, and 3351 to 3383, respectively).

[10] The Election Law of 1919 (Act No. 79 of June 25), required the elector to vote in the precinct where he "shall have resided for one year prior to the date of the election." Said provision was amended in 1965 (Act No. 3 of October 5) in order to substitute "shall have resided" for "who in good faith has established a domicile." The Electoral Code of 1974 eliminated the one-year term (see art. 4-002, 16 L.P.R.A. § 2132). The Electoral Law in force kept the provision of said Code in arts. 2.002, 2.003, and 2.007 (16 L.P.R.A. §§ 3052, 3053, and 3057, respectively).

[11] See Electoral Law of 1977, art. 5.034 (16 L.P.R.A. § 3234), to which we shall refer below.

Since 1936, the Puerto Rican electorate got used to the so-called closed polling place voting system.[12] On election day, each elector went to his polling place, was identified according to the polling lists, and stayed there from the moment the polling place was closed until it was his turn to receive the ballot, mark it according to his preference, and cast it in the ballot box. After the polling place was closed, all electors present received general instructions regarding the voting procedure. The system had its advantages and disadvantages. Through the Electoral Law in force, the lawmaker decided to change it for the open polling place system. The electors registration system was also changed and it now requires each voter to go to a specific place to be photographed, and where an electoral identification card that would be used in the new open polling place system, would be made for him.

For several reasons, many electors abstained from or could not go to have their photographs taken. From the 2,070,049 electors registered, only 1,518,313 were photographed, and from that number, 336,133 of them had not received the electoral identification cards by August 28, 1980.[13] No method had been provided in order to guarantee the voting rights of these electors through the open polling place system. This moves the Legislature to approve, barely two months before election day, Act No. 3 of September 8, 1980, which provided a mixed system of open polling place for those registered electors having electoral identification cards, and closed polling place for those who did not have cards. The electors who could vote in the open polling place would do so from 9:00 a.m. to 3:00 p.m., time when the polling places would close so that those who did not have cards could vote. This mixed system, which in the popular jargon began to be called "colegio entre-abierto"

---

[12] It was established by amendment to the Electoral Law of 1919 through Act No. 3 of June 9, 1936.

[13] See *P.S.P., P.P.D. y. P.I.P.* v. *Romero Barceló, ante.*

("half-open" polling place), received a heavy constitutional attack from the three opposition parties. They grounded their attack on the argument that the mixed system could open the way for fraud through double voting, in violation of the constitutional precept that the laws shall guarantee a universal, *equal*, direct and secret suffrage.

In a four to three divided decision we upheld the constitutionality of the act challenged.[14] We held that Art. IV, Sec. 4 of the Constitution gives the Legislature "a very wide margin of authority to legislate on electoral matters," citing from *P.N.P.* v. *Tribunal Electoral*, 104 D.P.R. 741 (1976), and we said: " . . . Once all the aforesaid circumstances have been considered, we would not affirm—even though accepting that the system adopted is not the most desirable—that the statutory mechanisms for avoiding fraud in the next election are so deficient and ineffective as to conclude that there is a well-grounded probability that its results be vitiated by a considerable number of fraudulent votes."[15]

---

[14] *Id.* The decision was reached with the votes of Mr. Justice Dávila, Mr. Justice Torres Rigual, Mr. Justice Díaz Cruz, and Mr. Justice Irizarry Yunqué. Mr. Chief Justice Trías Monge, with whom Mr. Justice Rigau joined, issued a dissenting opinion concluding that the mixed system can lend itself to fraud in violation of Art. II, Sec. 2 of the Constitution. Mr. Justice Negrón García also issued a dissenting opinion whereby he concluded that the mixed system could lead to the violation of the secretiveness of the vote. Mr. Justice Martín disqualified himself.

[15] In view of the obviously unexpected close margin of victory in this election, this affirmation raises serious questions. It was shown before the Court, and we stated it thus in our per curiam opinion, that the Registry of the Electoral Body contained "from 25,000 to 50,000 defective entries which corresponded to dead persons, or to electors with other registration entries who might therefore be used for casting a second vote." One million six hundred and nine thousand one hundred and two (1,609,102) voters participated in the election. The margin which gave the

We entered our decision and speedily published it on October 17, 1980, only eighteen days before the election. Up to that moment the voting method remained unknown, circumstance which strained even more the anxiety and restlessness prevailing among the electorate. Add to this the fact that important sectors of opinion had objected to the enactment of the Electoral Law of 1977 and were suspicious about the new agencies created by said law which placed all the direction and supervision of the general election in the hands of new officers who took the place of those who held similar offices under the former legislation. This was the psychological atmosphere prevailing in Puerto Rico before the election where the people hoped to express their will.

B. *The Facts*

Election day, November 4, 1980, finally arrived. Out of 2,071,775 registered electors, only 1,623,951, or 78.4 percent, cast their vote.[15a] After depositing their ballot, the people went home to wait for the results. Midnight came, and still there were no results. Different radio and television stations were broadcasting official and extra-official releases. The official results dispatched by the Commonwealth Election Commission came out slowly and indicated

---

victory to the candidate for the office of governor for the party in power was of only 3,434 votes, according to the figures furnished by the Commonwealth Election Commission, after the recount was closed.

[15a] These figures mark a rather considerable change in the main trend of the last twelve years which showed and ever increasing participation in the polls. In 1968, 74.4% of the electors voted (922,822 out of 1,176,895 registered electors), in 1972, a 80.4% (1,250,978 out of 1,555,504), and in 1976, a 86.1% (1,464,600 out of 1,701,217), according to official figures. The question is whether this drop could have been partly due to the excessive disorder in the legislation and in the electoral procedures, and to the restlessness and uncertainty caused by this.

that this was the most hard-fought election ever seen. Extra-official releases—those broadcasted by the different parties—were more frequent and, as was to be expected, each party gave more emphasis to favorable results. At a given moment, the Electoral Commission's computer system came to a stop. November 5 dawned and still there were no results. The uncertainty would last for days and weeks.

The day after the election the Commonwealth Election Commission decided, by unanimous agreement of its members, to publish the preliminary results for the office of governor pursuant to art. 6.007 of the Electoral Law, 16 L.P.R.A. § 3267. According to art. 1.004 (16 L.P.R.A. § 3004), the Commission is composed of a General Administrator, who shall be its chairman, and an Electoral Commissioner for each one of the principal political parties.[16] Said Commission is "the body responsible for organizing and supervising all electoral procedures" in every election, and it shall be its duty to, among other things, "(e) [deal with], investigate and resolve matters or controversies submitted for its consideration by any interested party." Art. 1.013 (16 L.P.R.A. § 3013).

The preliminary result published pursuant to said agreement indicated that the Popular Democratic Party candidate had obtained 734,095 votes, against 733,370 obtained by the New Progressive Party candidate; 25 electoral units corresponding to 17 precincts, 12,000 absentee votes and 18,562 challenged ballots were yet to be computed. See *P.P.D.* v. *Barreto Pérez*, 110 D.P.R. —— (1980), 80 J.T.S. 88.

---

[16] The Administrator is appointed by the Governor of Puerto Rico, with the advice and consent of a majority of the members making up each chamber of the Legislature. Art. 1.005 (16 L.P.R.A. § 3005). The Electoral Commissioners and Alternate Commissioners representing political parties are appointed by the Governor of Puerto Rico upon petition of the central directing body of the party they represent. Art. 1012 (16 L.P.R.A. § 3012).

On November 7, the Commission unanimously agreed to carry out the general canvass provided by art. 6.008 of the Electoral Law, 16 L.P.R.A. § 3268, through a ballot by ballot recount. This agreement was unanimously ratified on November 9, although it was modified so that the recount would begin on the following Monday, November 10. However, on November 9, the New Progressive Party Electoral Commissioner proposed that said agreement be reconsidered and that the general canvass be commenced after the adjudication of the absentee votes. The Electoral Commissioners of the other three parties raised objection. Since there was no unanimity, the decision was up to the General Administrator, pursuant to Art. 1.014(e), 16 L.P.R.A. § 3014(e).[17] Its decision favored the proposal of the New Progressive Party Commissioner, and said proposal became, by provision of the above-cited art. 1.014(e) the decision of the Commission. The Commissioners of the three opposition parties appealed this decision before the Electoral Review Board. The Board affirmed the decision and also ordered the Administrator to issue a new official publication of the election result. The Administrator did so immediately and proclaimed the New Progressive Party candidate to the office of governor as the winner by 750,343 votes against 747,787 votes cast for his strongest adversary, the Popular Democratic Party candidate.

The Board's decision and the Administrator's act gave rise to *P.P.D.* v. *Barreto Pérez*, 80 J.T.S. 88, which we cited

---

[17] Subdivision (e) provides:

"(e) Every agreement of the Commonwealth Election Commission must be approved by the unanimous vote of the Commissioners present at the time of voting. The General Administrator of Elections shall decide for or against any question submitted for the Commission's consideration that does not receive a unanimous vote, and his decision shall be considered as the Commonwealth Election Commission's and may be appealed in the manner provided in section 3023 hereunder."

above. In our opinion of November 14, we reversed the decision appealed from and ordered the continuation of the general canvass. We stated the following:

> The country is going through a moment of great difficulty and stress. In such hard circumstances it is necessary to act in a serene and sensible manner. The important thing is the triumph of the Puerto Rican people as a whole; that the quality of our democracy remains untainted and that the cleanliness of our electoral processes be kept; that our Constitution and our laws be respected. We exhort our people to at all times keep the utmost peacefulness and moderation.

The precinct by precinct and ballot by ballot recount was commenced. By mid-December the canvass reached Representative District No. 35, which comprises the following precincts: the municipalities of Río Grande (97), Luquillo (98), Fajardo (99), Culebra (100), Vieques (101), and the Machos, Pueblo, Río Abajo and Sacos Wards of the Municipality of Ceiba (102). Electoral Law, art. 5.008 (16 L.P.R.A. § 3208), and see also Art. VIII, Sec. 1 of the Constitution. The New Progressive Party candidate for House Representative for said Representative District was Mr. Osvaldo Molina. The Popular Democratic Party nominated Mr. Samuel Cepeda. At the end of the canvass, candidate Molina had five votes more than candidate Cepeda. The Popular Democratic Party and Mr. Cepeda timely appealed before the Electoral Review Board. Each submitted a brief challenging acts of the Commonwealth Elections Commission, alleging miscalculations and incorrect adjudication of ballots which, if reviewed, would tip the balance in his favor. Molina also resorted to the Board and alleged improper adjudication of ballots which, when corrected, would increase his margin of advantage. The cases were filed with the Board under Nos. JR-80-274, and JR-80-285.

Apart from the importance of the correct adjudication of the District to the candidate who was lawfully elected,

the determination of the winner is fundamental for the control of the House of Representatives. We have already pointed out that the election was very close, fact which has been dramatized by the margin of victory of the governor elect: 3,434 votes, from a total vote of more than 1,600,000. The Popular Democratic Party obtained control of the Senate when fifteen of its candidates were elected, against twelve elected by the New Progressive Party. The House of Representatives, composed of 51 members,[18] was equally divided between the two above-mentioned parties—25 representatives each—and the control thereof shall depend of which party wins District 35.

The Electoral Review Board consolidated the cases and held hearings where the parties offered both documentary and oral evidence. The hearings were held on workdays and holidays, at hours many times running very late into the night, and often irregularly because of the difficulty in summoning witnesses,[19] cases had to be fractioned and the order of the evidence constantly altered. The hearings began on December 18, 1980, and lasted till the early hours of January 10, 1981. Four days later, on January 14, 1981, the Board issued a long resolution analyzing the case of each one of the electors whose vote was in controversy and finally it deducted twenty-eight of the votes adjudicated by the Commission to Cepeda, and seven of the votes adjudicated to Molina, thus the election was adjudicated to the latter. His margin of victory over Cepeda was reduced to twenty-three votes through amending resolutions of January 16 and 21, 1981.

The decision of the Board was not unanimous. Its Chairman Mr. Schmidt Monge, and the associate member Mrs. Irizarry, signed the resolution of the majority. Associate

---

[18] Art. III, Sec. 3, of the Constitution.

[19] The hearing period coincided with the Christmas holidays, which, of course, caused additional problems.

member Mr. Dapena Yordán issued a separate opinion concluding that candidate Cepeda won the election by a seven-vote margin.

In their appeal before us appellants challenge the Electoral Review Board's decision, grounded on several contentions which may be summarized as follows: (1) the application of restrictive standards regarding the right to vote when adjudicating a ballot where, as alleged, the voter's intention was clear; when determining the domicile of the electors; and when passing on controversies regarding transfers of electors; (2) failure to apply strict standards with regard to the challenger's duty to strictly comply with the statutory requirements; and regarding the grounds of the challenges when annulling votes on grounds not alleged by the challengers; (3) the use of the preponderance of the evidence standard when passing on its value and sufficiency to annul the vote of an elector; (4) having acted with passion, prejudice and partiality.

In our analysis of the contentions raised, we shall not abide by this order nor by this summary of the issues. As we have already said, we shall expound the controlling standards applicable to these cases and, then, we shall analyze each case according to said standards and to the evidence brought.

II

Controlling Standards

The standards we shall discuss herein, and which we understand are the only ones compatible with the constitutional mandate which guarantees "the expression of the will of the people by means of equal, direct and secret universal suffrage" free from coercion, were outlined in the introductory paragraphs of this opinion. We shall now discuss them and, for the sake of brevity, group those which are closely related.

A. *Presumption of the validity of the vote, burden of proof and its value and sufficiency to annul or restrict the vote*

When the 81st Congress and the President of the United States approved Public Law No. 600 of July 3, 1950—offered to the People of Puerto Rico "in the nature of a compact" for its acceptance or rejection, and approved by the people in a referendum held on June 4, 1951—a democratic process began which culminated in the adoption of the Constitution of the Commonwealth and its promulgation on July 25, 1952. This put an end to four and a half centuries, which began with the discovery of Puerto Rico in 1493, during which period the organization and disposition of our government was in the hands of powers foreign to the sovereignity of the people of Puerto Rico, exercised from the distant Metropolis of Madrid, first, and then Washington, without our participation or approval.[20]

Hence, the process which culminated in the adoption of the Constitution constitutes the most important achievement in our political history; the first and, up to this moment, only exercise of our people's right to provide for the organization of our government. When doing so, our people became aware of their natural right to be politically organized on a fully democratic basis, to promote the general welfare and to ensure for themselves and for posterity the full enjoyment of human rights. The Preamble of the Constitution declares:

> The democratic system is fundamental to the life of the Puerto Rican community;
>
> We understand that the democratic system of government is one in which the will of the people is the

---

[20] For a recent exposition on the development and scope of the present relation between Puerto Rico and the United States, see *Cordova & Simonpietri, Inc., Co.* v. *Chase Manhattan Bank,* (1st Cir.), decided on May 19, 1981, part II.

> source of public power, the political order is subordinate to the rights of man, and the free participation of the citizen in collective decisions is assured;
>
> . . . . . .

In harmony with these principles, and bearing in mind the experiences of its troubled progress in the exercise of the electoral franchise to which we referred on Part II of this opinion, the following mandate was expressed in Art. II, Sec. 2, Bill of Rights of the Constitution:

> The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise.

Our Legislative Assembly has strived to fulfill this mandate through the legislation it has adopted to govern the electoral processes. It is now this Court's turn to play its part as zealous keeper to see that it is complied with. We recognize that the right to vote is one of the fundamental rights of the people and, as such, we have the duty to enforce it and to make the people respect it. Observance or respect thereof would not be attained if we allow that a vote cast be annulled or its value reduced by any attack. The legality is presumed; any deviation from the fulfillment of the law must be shown. We can ask nothing less with regard to the right to vote. It enjoys a presumption of legality and validity, and whoever challenges it has the burden of proof to destroy said presumption.

The framers of the Federal Constitution did not include among its provisions the people's right to vote, maybe because it is an unquestionable natural right in the democratic system. However, implied recognition was given to it in the Fifteenth, Nineteenth and Twenty-fourth Amendments which prohibits any restriction to the right to vote by reason of race, color or previous condition of slavery;

any discrimination for reason of sex in the exercise of said right; and any abridgement of the same by reason of failure to pay any poll tax or other tax.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), the federal Supreme Court recognized the fundamental nature of the right to suffrage "because preservative of all rights". And in *Reynolds* v. *Sims*, 377 U.S. 533, 535 (1964), it stated:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

The principles laid down in the aforecited cases, and in other cases we cited in *Ortiz Angleró* v. *Barreto Pérez*, 110 D.P.R. —— (1980), 80 J.T.S. 67, applicable under the U.S. Constitution, may be more forcefully applied under our local constitution which, as we have often pointed out, expressly guarantees universal, equal, direct and secret suffrage and the protection against any coercion in its exercise. We have reiteratedly recognized it thus. *P.S.P., P.P.D. y P.I.P.* v. *Romero Barceló*, 110 D.P.R. —— (1980), 80 J.T.S. 80; *P.P.D.* v. *Barreto Pérez*, 110 D.P.R. —— (1980), 80 J.T.S. 88; *P.S.P.* v. *Comisión Estatal de Elecciones*, 110 D.P.R. —— (1980), 80 J.T.S. 92.

Generally, fact-finding in civil cases is made by preponderance of evidence (Rule 10(F) of the Rules of Evidence) and, in criminal cases, guilt must be established beyond a reasonable doubt (Rule 110 of the Rules of Criminal Procedure). When the validity of suffrage is challenged, we face neither an ordinary civil case, nor a criminal one. The preponderance of evidence standard is adequate for settling conflicts among citizens, which most of the time deal with economic considerations. But, under the Constitution of the Commonwealth of Puerto Rico, which assigns such an important place to the right to vote, this cannot

be the standard used to destroy what is essentially the very life of the representative democratic system. Even in civil cases, rules more stringent than the mere preponderance of evidence have been required to establish a fact.[21] Whenever a fundamental right is denied, the due process of law requires that the value and sufficiency of the evidence be measured with more stringent standards.

In *Addington* v. *Texas*, 441 U.S. 418, 423 (1979), the Supreme Court stated:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397

---

[21] As examples, we have required "strong and convincing" evidence to rebut the presumption that property acquired during marriage is considered to be part of the community property, *Arroyo* v. *Vicario et al.*, 28 P.R.R. 753 (1920), *Cruz* v. *Heirs of González*, 72 P.R.R. 291 (1951), *Ex parte Espéndez*, 85 P.R.R. 419 (1962), cited and followed in *García* v. *Montero*, 107 D.P.R. 319, 335 (1978); we have established the "solid, clear, and convincing envidence" standard to show fraud, *González* v. *Rivera*, 42 P.R.R. 304 (1931), *Texas Co. (P.R.), Inc.* v. *Estrada*, 50 P.R.R. 709 (1936), *Serrano* v. *Torres*, 61 P.R.R. 157 (1942), *Heirs of Gómez* v. *Colón*, 63 P.R.R. 99 (1944), *Nine* v. *Ortiz*, 67 P.R.R. 883, 894 (1947), *Feliciano* v. *P. Cedeño, S. en C.*, 78 P.R.R. 37 (1955), *Monclova* v. *Financial Credit Co.*, 83 P.R.R. 742 (1961), *Banco Crédito* v. *Chico Sagastibelza*, 90 P.R.R. 121, 130, n. 10 (1964); and until *Ocasio* v. *Díaz*, 88 P.R.R. 658 (1963), we had required "strong and convincing evidence" in an action for filiation based on the possession of status, evidence standard which had to yield to the provision on the inviolability of the dignity of the human being and its prohibition against "discrimination . . . on account of race, color, sex, *birth, social origin or condition,* or political or religious ideas." Art. II, Sec. 1 of the Constitution (Bill of Rights). (Underscore supplied.)

U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In furtherance of these principles the Supreme Court recognized the existence of three standards of evidence for different types of actions. It held that "[a]t one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." (At 423.) The Court added: "In a criminal case, . . ., the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the State prove the guilt of an accused beyond a reasonable doubt."

From this point, the Supreme Court goes on to recognize the intermediate standard of proof, which is described with combinations of words such as "clear," "cogent," "unequivocal," and "convincing," and which, citing *Woodby* v. *INS*, 385 U.S. 276, 285 (1966), "is no stranger to the civil law." The applicability of this standard depends on the nature of the interest or right at stake.

Addington dealt with the standard of proof required for determining, in a civil action, whether a person was so mentally ill as to warrant his commitment to a mental hospital. To this end, the State of Texas required "clear, unequivocal and convincing evidence." The propriety and applicability of this standard was upheld in consonance with the due process of law.

In *Woodby* v. *INS*, *supra*, which dealt with the deportation of a citizen, and in *Schneiderman* v. *United States*, 320 U.S. 118, 159, which dealt with a denaturalization process—both cases cited in *Addington*—the Court held that the "clear, unequivocal and convincing evidence" standard was applicable. At 432; it stated, citing from Webster's *Third International Dictionary* 2494 (1961) that the term "unequivocal" stood for "'proof that admits of no doubt,' a burden approximating, if not exceeding, that used in criminal cases."

Recently, in *Fedorenco* v. *United States*, 66 L. E. 2d 686 (January 21, 1981), which dealt with denaturalization, the Federal Supreme Court pointed out that the standard must depend on the right involved, and stated: "Any less exacting standard would be inconsistent with the importance of the right that is at stake." To the same effect, see *Costello* v. *United States*, 365 U.S. 265, 269 (1961)—"American citizenship is a precious right"—*Baumgartner* v. *United States*, 322 U.S. 665, 675-676 (1941), *Woodby* v. *INS*, *supra* at 285, and *Scheiderman* v. *United States*, *supra* at 122, *inter alia*.

Vance v. *Terrazas*, 444 U.S. 252 (1980) is not contrary to our ruling herein. *Vance* raised whether Congress, on providing for loss of citizenship, may establish less strict standards of proof than those used in criminal cases and in civil cases where the citizen's liberty is in danger. The Court's ruling was in the affirmative in a decision divided five to four. The majority held the Congress' authority to require that the citizen's intent to relinquish his American citizenship—which is not merely a voluntary act of swearing allegiance to a foreign nation—be shown by preponderance of evidence. This decision has been strongly criticized. See *Evidentiary Proof in Expatriation Proceedings*, Note on 57 Chicago Kent Law Review 323 (1981).

The situation before us is different. The United States Supreme Court has not established a specific standard of

proof for the challenge of an elector's vote. In Puerto Rico and under our Constitution, we can resort to no other standard than that of clear, strong, and convincing evidence. Any other standard would do violence to the privileged status given by the Constitution to the exercise of suffrage free of coercion, and to its secretiveness. *Ortiz Angleró* v. *Barreto Pérez, supra.* This rule is similar to that used in different states under diverse sources.

Many North American state jurisdictions have made pronouncements in favor of a more exacting standard than that of the preponderance of the evidence for annulling the vote. In *Guerra* v. *Peña*, 406 S.W.2d 769, 775-776 (Texas 1966), when pointing out that the burden of proof to show the illegality of a certain number of challenged ballots was upon the contestant, the Court stated that the evidence to that effect had to be "clear and satisfactory." In *Pope* v. *Howle*, 149 So. 22 (Ala. 1933), the Court required conclusive proof that the elector was not entitled to vote in the place where he cast his vote. In *Buzzard* v. *Griffin*, 358 P.2d 155, 159-160 (Ariz. 1960), the Court required clear and convincing proof, not predicated on speculation or conjecture, as that necessary to prove electoral fraud. *Cf. Esteves López* v. *Bernazard*, 81 J.T.S. 3. The presumption of legality of a vote must be rebutted with affirmative evidence. *Hubbard* v. *McKey*, 193 So.2d 129 (Miss. 1966). Inferences, conjectures or hearsay are not sufficient to annul a vote. Doubts are decided in favor of the exercise of the right to vote. As we shall see later on when we discuss the determination of the domicile, a greater burden of proof has been required for a change of domicile than for establishing its continuity, and such evidence must be clear and convincing. See *Application of People ex rel. Croom*, 152 N.Y.S.2d 706 (1956); *McGee* v. *Bragg*, 53 A.2d 428 (N.H. 1947). *In Re Estate of Lauderuslanger*, 240 A. 2d 477 (Penn. 1968); *Hamlin* v. *Holland*, 256 F. Supp. 25 (E.D. Penn. 1966); *Collins* v. *Collins*, 199 S.E.2d 626 (Ga. 1973); *Jones* v. *State*, 176 S.E. 896 (Ga. 1934); *Atkinson* v.

Thomas, 407 S.W.2d 234 (Tex. 1966); *Ex Parte Weissinger*, 22 So. 2d 510-514 (1945); *inter alia*.

In short, the burden of proof to destroy the presumption of validity and integrity of the vote is upon the contestant who much show it through clear, strong and convincing evidence, not affected by exclusionary rules nor based on conjectures.

The Electoral Review Board erred by reiteratedly applying the preponderance of evidence standard, thus depriving many electors of their electoral franchise. The conclusiveness the Electoral Law gives to the Board's findings of fact does not imply that we shall necessarily abstain from examining said findings. We must see them within the framework of the applicable Law and, insofar as the fundamental right to suffrage is concerned, based on rules requiring that said right be guaranteed and asserted. When in such a transcendental matter the findings of fact are based on the wrong standard of proof, we cannot or should not be bound by them. In such circumstance, it is our duty to reevaluate the evidence pursuant to the correct standards and make such findings as are proper.

B. *Challenge requirements: grounds therefor: opportunity to the elector*

The challenge is an interdiction against the validity of the vote. Although it does not entail an immediate annulment, its purpose is precisely that of annulling it.[22] And

---

[22] Article 6.003 of the Electoral Law, 16 L.P.R.A. § 3263 provides:

"§ 3263. Challenged ballot

"All challenged ballots shall be counted for the candidates for whom they were marked except when such ballot is also protested or not adjudicated for any reason.

"If after an election it should be established that a challenged ballot was voted by a person or voter with no right

insofar as it is made in the polling place at the moment when the elector is about to receive the ballot, mark it and cast it in the poll box, it is a stoppage to said process to which the elector is submitted. This is annoying and in no way helps to maintain the climate of tranquility, peace and quiet so important in a moment of such consequence for the democratic system as is that when the citizen is going to express his will.

The challenge of the elector results in the violation of the secretiveness of the vote, one of the conditions that should be guaranteed by law pursuant to Art. II, Sec. 2 of the Constitution, we have cited so often. This is so because when an elector is challenged the ballot he cast must be identified so that his vote may be deducted if in the end annulment lies. Pursuant to art. 5.034 of the Electoral Law, 16 L.P.R.A. § 3232, the identification is made in the following manner: ". . . The ballot of every voter whose vote is challenged must be marked with the word 'challenged' on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge, *the elector's identification card number of the person affected*, the municipality precinct and number of the polling place. *If the challenged voter denies the challenge he must sign the challenged ballot on the reverse, under oath*, but if he does not deny it, his vote shall not be counted and shall be null and void. . . ." (Underscore supplied.)

The problem of those electors who did not have electoral identification card, even if they were registered, grew worst under the mixed voting system provided for the past elections through Act No. 3 of September 8, 1980 which established that polling places would be open during the morning, and closed from 3:00 p.m. In the last case, the electors

---

to vote in said election, the Commission shall order the annulment of the vote as well as the amendment of the canvass."

had to give a sworn statement, and if they refused, they were challenged, indicating on the back of the ballot, among other things, "*the name of the voter*, his electoral identification number," etc., and his vote would not be adjudicated in the Polling Place canvass. Act No. 3 of September 8, 1980, sec. 9(a). The provision is transcribed *in extenso in P.S.P., P.P.D. y P.I.P.* v. *Romero Barceló*, 110 D.P.R. —— (1980), 80 J.T.S. 80, in the dissenting opinion of Mr. Justice Negrón García. One of the bases of his dissent was the possibility that the said mixed voting system would lend itself to the violation of the right to a secret vote.[23] See footnote 14, *ante*.

The fundamental nature of the right to vote and the fact that the challenge would allow inquiry into the vote of the challenged voter having been considered, the statutory provisions which allow and govern the challenge—both regarding the grounds thereof and the procedure to make it—must be strictly complied with. This is the only way to comply with the constitutional obligation to guarantee the

---

[23] The brother Justice said:

"We note, then, that the framers of the Constitution conceived and contemplated only as an exception the interference or alteration of the secretiveness of the vote. We have pronounced ourselves in the sense that the secret vote of a citizen serves the purpose of ensuring and protecting him from all coercion in order to guarantee him his freedom of entering the polling booth secretly, alone with his conscience, and making his mark without anybody's concern of where and how he did it. *P.N.P.* v. *Tribunal Electoral*, 104 D.P.R. 741 (1976). We repeat that the confidentiality of the vote is essential because it 'avoids coercions and retaliations which could endanger the elector's independence and the consequent sincerity of his suffrage.' Pérez Serrano, *op. cit.*, 364. Only as an exception based on a compelling and legitimate interest resulting from a rational balance of alternatives, is it conceivable to open the vote to public scrutiny." (At 13.)

right to "equal, direct and secret universal suffrage" and to protect the citizen "against any coercion in the exercise of the electoral franchise." Constitution, Art. II, Sec. 2.

Article 5.034 of the Electoral Law, 16 L.P.R.A. § 3234, establishes the procedure for challenging an elector. Said article provides:

> § 3234. Challenge of a voter
>
> Any voter or inspector who has good reason to believe that a voter who has come to vote is doing so illegally, or has already voted in another polling place or precinct, may challenge his vote for the reason that made it illegal, pursuant to the provisions of this Act, but such challenge shall not prevent the person from voting. The ballot of every voter whose vote is challenged must be marked with the word "challenged" on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge, the elector's identification card number of the person affected, the municipality, precinct and number of the polling place. If the challenged voter denies the challenge he must sign the challenged ballot on the reverse, under oath, but if he does not deny it, his vote shall not be counted and shall be null and void. The Administrator shall send to each Polling Place a sample Challenged Ballot to show the Polling Place Board how to fill out a challenge.

Contention is made before us that the Electoral Review Board erred upon passing on the merits of challenges which did not bear the signature of the contestant who limited himself to state, in handwriting, "I, John Doe, challenge elector Richard Roe because he does not have his residence in Precinct X." We deem that such challenge was insufficient and should not have been considered.

"Signature" and "name" are not the same thing. In these challenges the contestant entered his name at the beginning of his challenge, but did not sign it thus violating the requirement that the challenge must bear the signature of the contestant.

The signature is the "name and surname, or title, of a person *which he stamps at the close of a document written with his own or with someone else's hand, in order to signify its authenticity or to bind himself with the statemen's made therein.*" *Diccionario de la Real Academia Española*, 19th ed. For a similar definition, see Rivera Garcia, *Diccionario de términos jurídicos* 103 (Equity Publishing Corp., 1976). In *Castañer* v. *Superior Court*, 81 P.R.R. 841 (1960), it was raised whether a writing in the testatrix's own handwriting and in whose first line she identified herself "I, Adele Bandler Castañer, married to José Castañer and residing in Borinquen Road of Aquadilla, post office box 762, declare. . . .") and then went on to state her last will without signing it at the bottom, is valid as a holographic will. We decided that it was not valid, and stated, at 843-844:

> It is undeniable that the juridical term "signature" has a calligraphic individuality different from the mere writing of the proper name by hand, for other purposes different from the solemn subscription of the last will of a document. The trial judge adopted as his own the definition of "signature" contained in the Judgment of January 5, 1924 of the Supreme Court of Spain: "By the signature of a person it is understood that which he, in all the acts of his life, in the most important and solemn ones as well as in the ordinary ones, in his relationship with other persons, usually *puts at the bottom* of his papers.

What determines whether a document is signed is not the appearance thereon of the executing party's name in

his own handwriting. His name becomes his signature when he enters it at the close of the writing to signify his last will, giving it his personal authentication and thus binding himself with whatever statements are made therein.

With regard to the grounds for challenge, they must necessarily be stated so that the elector is given the opportunity to answer it. Please note that the Act requires that denial of the challenge be made under oath, which entails the penalties for perjury. If a specific ground for the challenge is given, it must be kept. For the purposes of challenging a vote, the challenge is the contestant's allegation. When passing upon the challenge, it would be improper and contrary to the due process of law to inquire into any other motives not alleged by the contestant. When the contestant puts on the back of the ballot the ground to challenge an elector, he gives the latter the opportunity to deny it on the same ballot before marking it and casting it in the ballot box. If upon examining said challenged ballot for adjudication, other grounds for challenge are involved, this would be an *ex parte* decision, that is to say, based on motives not mentioned to the elector at the moment his vote was challenged.

In short, unobservance of the statutory procedure and requirements provided for perfecting a challenge renders it ineffective. After passing this test, the only thing to be borne in mind when passing on the merits of the same are the grounds stated therein. In *P.S.P.* v. *Comisión Estatal de Elecciones*, 110 D.P.R. —— (1980), 80 J.T.S. 92, we said:

> As a result of the aforesaid, any ballot cast that has not been correctly challenged and meets all other requirements is a vote deemed unquestionably valid and cannot under any circumstances be subsequently challenged or examined. Considerations such as (1) not knowing the challenged elector's name; (2) possible violation of the right to a secret ballot; and (3) the

impossibility of terminating the electoral dispute, invalidate this sort of post-election day challenges.

Finally, the elector must be given ample opportunity to defend his vote. Among the elector's rights and prerogatives, the Electoral Law consecrates the "guarantee of the right to an equal, free, direct and secret vote to each person." Art. 2.001, item 2 (16 L.P.R.A. § 3051(2)). This is in harmony with the constitutional mandate. To make this guarantee effective, the elector whose vote is challenged must be entitled to deny said attack, art. 5.034 (16 L.P.R.A. § 3234), and to appear and be heard in a hearing where the propriety of the challenge is examined and adjudicated. To that end, he must be duly summoned well in advance. To this effect, the mere negative service of a summons cannot be sufficient. It must be shown that reasonable efforts were made to notify him. The value of a vote cannot depend on incomplete services which are sometimes made by persons who may be quite interested in that the vote not be counted.

The foregoing does not mean that the elector does not have to comply with certain obligations in order to assert his vote once it is challenged. We have already mentioned art. 5.034 of the Electoral Law, 16 L.P.R.A. § 3234, which provides the manner to challenge an elector and which requires that "[I]f the challenged voter denies the challenge he must sign the challenged ballot on the reverse, under oath, but if he does not deny it, his vote shall not be counted and shall be null and void." According to this provision, the elector cannot remain idle. If he does not deny the challenge at the moment it is made and the latter states facts which, if true, constitute a valid reason to annual the vote, said vote shall not be counted and shall be null and void.

C. *Errors for which the elector is not responsible: transfer cases*

When considering the issues raised regarding the transfer of electors, we deem it convenient to refer to the four specific cases regarding this particular, momentarily deviating ourselves from the outline we had planned.

The cases deal with four electors who cast straight ballots [24] for the Popular Democratic Party and, consequently, for its candidate Mr. Cepeda. Their votes were totally or partially annulled by the Commonwealth Election Commission—which decision was affirmed by the Electoral Review Board—because they had cast their vote in precincts which were part of Representative District No. 35 and not at the place where they were registered.[25] Said electors had timely requested their transfer to the respective precincts where they went to vote. There is no controversy as to the fact that said electors had their domicile where they voted.

Among the requirements that a person should meet in order to vote, art. 2.003 of the Electoral Law, 16 L.P.R.A. § 3053, provides that he should be "duly registered . . . prior" to the date of the election. Article 2.014 (16 L.P.R.A. § 3064) contemplates the possibility that an elector registered in a precinct transfers his registration to another precinct where he shall have his domicile by election day and where, for that reason, he shall be entitled to vote. To that end, it provides that the Commonwealth Election Commission shall establish by regulation a transfer me-

---

[24] "'Straight Ballot' shall mean the ballot on which the voter casts his vote for the entire slate of a single political party." Art. 1.003(28) (16 L.P.R.A. § 3003(28)).

[25] There is an exception of an elector who was not registered, but which we shall include in this part because it is also a transfer case.

chanism. Insofar as pertinent, the first paragraph of said article reads:

> The Commission shall establish by regulation a system whereby any registered elector may request that his registration be transferred from one precinct or *barrio* to another, because he has changed his domicile.

In keeping with this provision, on May 15, 1979, the Commission promulgated the regulations for partial registration of electors which regulated the transfer procedure. Pursuant to these regulations, boards composed of representatives of each of the main political parties were constituted. The function of these boards was to fill in the registration application forms and petitions for transfer. Rule 8 of the Regulations. Each party had to appoint a person to work in the polling place filling said forms. The officers would take turns in the process, Rule 10(a) of the Regulations, so that the duty of filling registration applications or transfer petitions would not fall always on one person, representative of a single party. The Commission had to organize the technical resources in order to centralize the assignment of the valid transfer petitions to the corresponding district; that the petitioner would be excluded from the precinct where he was originally registered; and that he be included in the precinct where he had his new domicile. Rule 16 of the Regulations.

In view of the problem caused by the failure to process a great number of elector's transfers, on October 28, 1980, the Commonwealth Election Commission adopted an agreement which provided, among other things, the following:

> *Case A*—In cases of electors who have applied for a transfer without it being processed, or who have been incorrectly situated by the Commission, the elector must bring with him his copy of the transfer or may request a photocopy of the same from his party or

from the Commission in order to assert such situation. In these cases, the elector shall vote in the place where he is listed, and his vote shall be completely adjudicated in the polling place.[26]

Election day, November 4, 1980, finally arrived. When they showed up at the polling place where they had to cast their vote, many electors were faced with the fact that their names were not on the electoral list despite having transacted the corresponding transfer. In view of this situation, on that same day the Commonwealth Election Commission agreed to allow persons who alleged being qualified voters to vote even if they did not appear on the list, as long as they could show their electoral identification card or a copy of their registration or transfer petition. Thus, an elector whose transfer petition had not been transacted by the Commission could vote pursuant to the agreements of Oc-

---

[26] According to the Resolution of October 28, 1980, the other criteria for adjudicating the votes of electors who did not have their residence in the precinct, were the following:

"*Case B*—Those electors that, despite not having made a transfer, have been assigned to a precinct different from that where they usually reside, shall vote at the polling place on whose list they appear and their vote shall be completely adjudicated in the polling place.

Case C—In cases where the electors appear in the list of a precinct where they no longer have their residence and have not made a transfer, they may vote at the polling place on whose list they appear but their vote shall be challenged and shall not be adjudicated at the polling place.

If necessary, the Commission shall adjudicate the votes in the general canvass, but in every case, they shall be counted only for the offices of Governor, Resident Commissioner, Senator and Representative-at-Large and, depending where he resides, the votes may be localy valid.

These electors shall state under oath their new address, municipality and the precinct, if they know it." Appendix, p. 286.

tober 28 and November 4, 1980, in any of the following places: (1) in the original precinct (Case A), or (2) in the precinct where he requested to be transferred.[27] Those who chose the second alternative would have to vote at a special polling place denominated F-1, which would operate under the closed polling place system.

Let us now examine separatedly the cases of electors Jóse A. Acosta Anglada (JR-80-278), Héctor Ramírez Aponte (JR-80-280) and Rafael T. Rodríguez Rodríguez (JR-80-284). The three of them were registered in precincts which were not the ones in which they voted. Later on we shall discuss the case of elector María Luz Morales Meléndez (JR-80-283), which raises a different situation.

José A. Acosta Anglada (JR-80-278)

In the 1976 elections, this elector voted at precinct No. 109 in Río Piedras where he was registered and where he had to vote. In August 1977 he moved to Luquillo and in 1978 he went to a registration place in said municipality and filed a petition requesting transfer of his registration to that precinct. In April 1979, Acosta moved to Fajardo and in October of that same year he transacted a transfer to that precinct. After this second transfer, the Commission issued him an electoral identification card.

On November 4, 1980, the elector showed up at Polling Place No. 14 of Fajardo but could not find his name on the list. The local commissioner of his party told him to stay there because he had his electoral identification card. That afternoon Mr. Acosta cast his vote at a special polling place denominated F-1, which operated under the closed polling place system.

---

[27] We shall not discuss herein the power of the Commonwealth Election Commission to foster, although by an unanimous agreement, that voters unqualified by reason of their residence could vote and influence the election results at a place where they did not belong.

His vote was adjudicated only to the national candidates, *i.e.*, governor, resident commissioner, and senator and representative-at-large. His vote was not adjudicated to the candidate for representative of District No. 35 for whom he had voted.

There is no controversy as to the fact that this elector has his domicile in Fajardo.[28] The only issue here is whether his transfer from precinct 109 to precinct 35 had been performed.

The Commission did not transact Acosta's transfer petition because the officer who took the elector's information wrote, in the three spaces provided for identifying the precinct where he was registered the key number "065" and, right after it "Río Piedras."[29] (See Appendix A.)

The error in this information is not "Río Piedras," because this was the place where, in effect, the elector was registered, but the key number. According to the Commission, "065" indicated that the elector was registered in Ponce because precinct No. 65 belongs to Ponce and not to Río Piedras. Apparently, the mistake was made when the officer who took the information instead of "109" wrote "065," which is the code number assigned for other purposes to San Juan of which Río Piedras is a part. (See Appendix B.)

Héctor Ramírez Aponte (JR-80-286)

Elector Héctor Ramírez Aponte was registered in Caguas in 1975, but did not vote in the 1976 general election. After this event, he moved to Canóvanas where he requested a transfer in 1979. Then he moved to Río Grande, and on July 6, 1980 he again requested a transfer to said precinct. A short while later he went to be photographed

---

[28] This was so at the date of the transfer, as well as by November 4, 1980, day when he cast his vote.

[29] The facsimile of this part is the following: 065 Río Piedras.

and received an electoral identification card which he presented on election day in order to vote. But his name did not appear on the electoral list. This notwithstanding he voted at an F-1 polling place in compliance with the procedure established on that same day by the Commission. His vote was annulled. The Commission did not adjudicate his vote because the electoral identification number of elector Héctor Ramírez Aponte corresponded to his sister Adela Ramírez Aponte and not to him.

Asked why this error had been committed, attorney Ramón Ruiz Roche, Secretary of the Commonwealth Election Commission declared that (p. 37)" [the] only possible explanation is that at the moment the transfer was made he was assigned the electoral number of his sister Adela and, hence Adela, and not the elector, was transferred [and] this automatically eliminates this elector from the electoral lists." (Tr. Ev., Vol. II, p. 250.) He added that the only way in which the elector could have contributed to the mistake was if he had included his sister's number in the transfer petition, but, in this particular case, however, the corresponding space was blank. (*Id.*, p. 251.)

On review before the Board, the latter decided to affirm the Commission but on other grounds, to wit, that the transfer petition was not validly perfected (Resolution, p. 186), because the elector did not fill the space corresponding to the elector's number and, consequently, he should have voted in Caguas and not in Río Grande.

Rafael T. Rodríguez Rodríguez (JR-20-284)

This elector was registered in precinct No. 109 of Río Piedras, (Tr. Ev., Vol. III, p. 475). The Commonwealth Elections Commission issued him an electoral identification card. (See Exhibit No. 37.) Rodríguez moved to Fajardo and on July 6, 1980 he requested a transfer to that precinct.

On election day (November 4, 1980), he could not find his name on the electoral lists of Fajardo, for which fact he had to vote on a special F-1 polling place. He presented his identification card and a copy of his transfer petition, and he cast a straight ballot. His vote was adjudicated to the national candidates but not in favor of the candidate for representative because no transfer petition could be found on the records of the Commission. While the case was on review before the Board, the elector's transfer petition was finally found. However, the Board affirmed the decision of not adjudicating his vote to local candidates because the original precinct number and the electoral identification number were not included in the transfer petition.

The errors or omissions in the three transfer petitions under our consideration refer to two particular facts: (1) error in or failure to include the elector's original precinct number; and (2) failure to include the elector's electoral number.

Regarding the first fact, Mr. Ramón Ruiz Roche, Secretary of the Commonwealth Election Commission, stated before the Electoral Review Board that the elector usually does not know the information regarding his precinct's key number for, to that end the registration officer has on the table a book from which he takes said information. (Tr. Ev., Vol. II, p. 218.)

With regard to the second fact, Mr. Ruiz Roche stated that the *common practice* is that in most cases the space for entering the elector's number *is left blank*. (Tr. Ev., Vol. II, p. 251.)

There is no doubt that the errors or omissions were not due to fraudulent or delinquent acts of the elector or of some officer. In the last instance, they were negligent acts or omissions, mere clerical mistakes which bore no consequence. Regardless of who made the mistake (whether the elector, the registration place officer or the very Com-

mission), this information helps to expedite the administrative transaction, but is not indispensable for making the transfer.[30] Such is the case that the "Instruction Manual" for the members of the Local Electoral Commissions and

---

[30] Appellees insist on the theory that the table officers who worked on the registration and transfer process are persons affiliated to the different political parties who work voluntarily and without remuneration and that, hence, are not public officers or Commonwealth Election Commission's employees as such.

The electoral registration process is a governmental function. The Commission's vicarious liability for acts performed in its name by these officers of the different political parties cannot be subordinated to employment criteria in its orthodox work-salary meaning.

Neither are these officers employees of the electors who go to the registration places seeking registration or transfer. They are an indispensable instrument of the Commission, which is the administrative body having the statutory obligation of carrying out the electoral process. Nobody can deny that without the collaboration of all the political parties and their affiliates this process would have been more imperfect and irregular than it really was. But the absence of this labor-management bond does not preclude us from examining it within the agency's most celebrated framework. The registration place officer who acts in the electoral process is an agent of the Commonwealth Election Commission and not of the elector. *Cf. Board of Registration Com'rs* v. *Campbell*, 65 S.W.2d 713, 718 (Ky. 1933). (The officers who participate in the process are public officers and, as such, they are generally considered as agents of the State, and not of the electors or of the party designating them.)

Hence, the Commission has the inescapable obligation of supplying them with their working materials, of giving them orientation, instruction manuals, and of stringently supervising their work. In short, instead of operating under the "hands out" theory, the Commission should be more attentive to the participation the law has reserved for those officers, and should be more zealous in absorbing the liability entailed by whatever of their acts which are not fraudulent or delinquent.

Registration Place Boards instructed the officers as follows: " . . . The officers shall ask the petitioner for his electoral identification number, if he knows it. This shall not be an indispensable requirement for accepting his Transfer Petition." (4th ed., San Juan, September 1979, Part III, item 4, p. 8.)

We should also point out that not all the irregularities in the electoral process result in the annulment of the vote. For this to happen, the irregularity must be such that it affects the fairness and equality of the electoral process. In *Upton* v. *Knuckles*, 470 S.W.2d 822, 827 (Ky. 1971), the rule was expressed as follows:

> The proof must be of such flagrant, extensive, and corrupt violations as to destroy the fairness and equality of the election. [Citations] It is only in the most flagrant kind of case that voters will be difranchised for illegal acts of the election officials. [Citations].

Mr. Ruiz Roche stated that an error as that committed in this case could have been corrected by the Commission with a minimal additional effort, if there had been time. (Tr. Ev., Vol. II, p. 220.) He pointed out that in this case there was no time because the elector's transfer petition was not the only one. There were thousands of them. In view of this fact, we cannot approve the criteria used by the Board, which gave a nullifying character to a mere clerical error. Even if the Commission alleges that it had an overload of work to excuse its failure to correct this error in time, the right to suffrage cannot be subordinated to the administrative efficiency or inefficiency in the task of implementing the electoral process. We have stated above that suffrage is a fundamental constitutional right.

As a requirement to exercise the right to vote, the government may ask an otherwise qualified elector to register himself. *Ortiz Angleró* v. *Barreto Pérez, supra.* It may also

require a person who changes his residence to request a transfer to the new ward or precinct. The State may require an elector to register or to transact his transfer to the place and on the date it determines, as long as the elector is given a reasonable opportunity to do so. *Ortiz Angleró* v. *Barreto Pérez, supra.* It may also require an elector to give any information necessary or indispensable to complete the registration or transfer process. Information regarding sex, age, and domicile is important for the State's making sure that the person has the necessary qualifications to be on elector and thus prevent electoral fraud. *State ex rel. Klein* v. *Hillenbrand,* 130 N.E. 29 (Ohio 1920); Note, *Validity of Statute Requiring Information as to Age, Sex, Residence, etc., as Condition of Registration or Right to Vote,* 14 A.L.R. 260.

Because of their compelling character, all these are reasonable and necessary requirements that may be imposed by the State in order to avoid deceit, to guarantee the integrity of the canvass, and to establish the will of the people freely expressed at the polls. These requirements should be imposed in such a way as not to burden the elector, with exacting conditions or demands which may impair his right to vote or which may discourage the exercise thereof.

The procedure adopted in the agreements taken by the Commission met these standards. However, in applying them, the Commission has given a nullifying character to a mere clerical error thus going beyond the very text of the Act, the agreements and the Regulations because we have not been able to find in them any provision whatsoever requiring the Commission to interpret said clerical error as a radical nullity, which interpretation was affirmed by the Board.[31] This interpretation had the effect of unjustly nullifying the exercise of the electoral franchise.

---

[31] This, of course, makes it unnecessary to consider whether the radical nullity rule would be constitutionally permissible. When-

The persons involved in these three cases are duly qualified electors who moved from one precinct to another precinct comprised within Representative District No. 35, who requested their transfer at the place and date set by the Commission, who furnished the information required by the registration place officials who filled for them the corresponding transfer petition, who signed the said petitions and went home believing that the transaction would be satisfactorily completed and that they would be able to vote at the place to which they requested to be transferred.

The record before us does not show that these electors had been warned of the fact that any omission or error in their petition would nullify their right to vote, that for such reason they should see that the registration place officials correctly filled in the form, and that they should be on the quivive during the Commission's transaction of their petition.

With regard to the petitions for registration, Rule 14 of the Regulations for Partial Registration provided that the Commission would not transact petitions containing clerical errors or omissions. In that case, the Commission was bound to notify the elector "in writing, to the mailing address given in the petition for registration, granting him a fifteen (15) day term to [appear] before the Local Commission to present the information omitted, to supply whatever information was missing, or to show cause why he should not be excluded from the Register of Electors." But the Regulations made no provision for a similar mechanism (with a notice to the elector) for correcting clerical errors or omissions on the petitions for transfer. In dealing with the latter, the Commission chose a procedure which frustrated the transfer at the slightest error. Mr. Ruiz Roche stated that whenever they encountered an error of this

---

ever an issue may be solved through a statutory analysis, it is unnecessary to examine the constitutional aspect. *Pacheco* v. *Srio. Instrucción Pública*, 108 D.P.R. 592, 601 (1979).

nature, the petition was not processed. In its stead, a list of unprocessed transfer petitions was made which was sent to the different political parties. (Tr. Ev., Vol. II, p. 217.) The elector was not notified even if he had given his new address on the transfer petition. (Tr. Ev., Vol. II, p. 218.) Neither was this list posted on a public place. (Tr. Ev., Vol. III, pp. 486-87.)

Appellees alleged that the electors affected by this procedure had ample opportunity to find out that their petitions had not been processed, because there was an orientation media campaign which should have stirred the curiosity of every elector to know his electoral status after having sought a transfer. This proposition is untenable because it would always hold the elector, and not the State, responsible for the supervision of the administrative transactions of the Commonwealth Election Commission.

However, in these three cases, the electors voted where they had to vote, and they have had the opportunity to be heard. They showed that they were qualified electors and that their votes should be counted. That is why we do not have to decide now whether the due process clause of the United States Constitution or of our Constitution requires the Commission to notify the person, before election day, that his transfer petition has been rejected due to defects or irregularities on the same. In our opinion the November 4, 1980 agreement which allowed the electors to vote in the place to which they had requested their transfer, met the constitutional requirement of the due process of law.

State jurisdictions in the United States have upheld the same standards we hold herein. See, *Celler* v. *Larkin*, 335 N.Y.S.2d 791 (1972); *Jaycox* v. *Varnum*, 266 P. 285 (1924); *Goss* v. *Klipfel*, 146 P.2d 217 (1944); *Haggard* v. *Misko*, 83 N.W.2d 483 (1957).

María Luz Morales Meléndez (JR-80-283)

The case of this elector is rather different from the three we have discussed above. On June 6, 1980, she filled a petition seeking transfer to the precinct of Río Grande, where she has her domicile. On election day she had to vote at an F-1 polling place because her name was not on the electoral list. Her vote was annulled because she was not registered for the 1976 nor the 1980 elections.

Appellant contends before us that it can be inferred that the elector's registration was lost. This is based on the testimony given before the Board of Mr. Ruiz Roche, Secretary of the Commission, in the sense that it has happened "in other cases" that "although the person is registered, the registration cannot be found, and later on they have been able to corroborate that the person is registered." (Tr. Ev., Vol. III, p. 458.) We do not think that said statement alone is sufficient to infer that Mrs. Morales Meléndez' registration was lost.

On the contrary the elector's testimony suggests that she believed that on July 6, 1980, she had gone to register herself, not to get a transfer. On that occasion when the "registration officer" asked her "where do you live?" she answered that she lived in Río Grande, "but I used to live in Country Club." (Tr. Ev., Vol. VII, p. 1170.) The officer could have interpreted that she was asking for a transfer from Country Club to Río Grande, and that this was not a first registration. Nobody asked her if she had voted at the 1976 elections. That is why the officer prepared her a transfer petition, and not a registration petition.

On the date in question, July 6, 1980, partial registrations and transfers of electors were being carried simultaneously. There was a form for each thing, although said forms were similar. (See the illustration included herein as Appendix "C".) One of the forms was entitled "Petition

for Registration as Elector," and the other "Transfer Petition." Both forms required the following information:

(a) elector's full name;

(b) father's and mother's name;

(c) sex, eye color, height;

(d) place of birth;

(e) date of birth;

(f) mailing and residential address;

(g) place and date of the petition or application;

(h) signature of the elector, and,

(i) authentication of the signature.

All this information appears on the "Transfer Petition" form filled by Mrs. Morales (Appendix "D"). Of course, there is no information there as to her civil status or citizenship for this was the only additional information required by the registration petition and not by but in the transfer petition.

The Commission did not process Mrs. Morales' transfer petition because it did not appear that she was registered. Neither did they inform this fact to her. Instead, it included her name in the list of unprocessed transfers, something of which she was never aware. On election day, she went to vote using, as we have said, the copy of the transfer petition. Her vote was annulled.

We think that after corroborating that there was no previous registration, the Commission, based on the information given in the transfer petition, was in a position to consider the petition as what it was: a petition for registration. Being an agency specialized on electoral matters, the Commission should have foreseen the situation where an elector, due to error, ignorance or negligence of his part,

or due to somebody else's error, ignorance or negligence, could fill one form instead of the other. A similar situation arose when the Commission had to authorize the so-called administrative transfer. In its brief, the appellee describes the situation as follows:

> In addition to this and adopting a liberal attitude, the Commission—upon becoming aware that almost 19,000 electors were confused and upon filling the F-1 form thought they were filling a transfer petition—unanimously agreed to validate F-1 forms as transfer petitions, and these have been called administrative transfers. F-1 forms were those filled by the electors when they were photographed, for the sole purpose of carrying out the Electors Identification Card Project and in order that the Electoral Identification Card bore the correct address.

If a change of address form could be considered a transfer petition, we do not see any reason why a transfer petition could not be considered a petition for registration. Thus, it would have been equally just to apply the same liberal standard in one case and in the other.

We should not forget our statement in *P.S.P.* v. *Comisión Estatal de Elecciones*, 110 D.P.R. —— (1980), 80 J.T.S. 92:

> The population participating in the election exceeded the one and a half million mark. They were people from all walks of life, with a diversity of social, economic, and educational backgrounds. With this in mind, let us recall the constitutional warning to the effect that "[n]o person shall be deprived of the right to vote because he does not know how to read or write. . . ." Art. IV, Sec. 4. Seen in its proper perspective, this principle could imply, in its varied manifestations an interdiction on annulments due to the electors failure to follow instructions that only slightly affect the

legislative interest in safeguarding the elector's intent.[32]

Once we have decided that the transfer petition should have been considered as a petition for registration, the Commission was bound to notify the elector of any omission or clerical error which made completion of the transaction impossible. We have already mentioned Rule 14(b) of the Regulations for Partial Registration, which provides that when from the fact of the petition "it appears that the elector is not qualified to be included in the Register of Electors [because, for example, it does not appear, as in this case, whether or not the petitioner is a citizen of the United States] the Commission shall notify the elector in writing to the mailing address given in the petition for registration, granting him a fifteen (15) day term to appear before the local Commission to present the information omitted, to supply whatever information was missing, or to show cause why he should not be excluded from the Register of Electors." (Brackets supplied.)

In this case, said notice was not served. The right that the Electoral Law recognized to said elector was thus violated. *Cf. State ex rel. Barancik* v. *Gates*, 134 So.2d 497, 500 (Fla. 1961), where the court held that striking an elector from the register of electors without previously notifying him violates the due process clause of the federal Constitution. This notwithstanding, the elector was able to exercise her electoral franchise despite the fact that her vote was challenged. At the hearing held before the Board, nobody brought evidence to show that Mrs. Morales was not a qualified elector. The evidence only established that she was not registered. Her vote is valid and should be counted.

---

[32] We should also remember that, pursuant to the Electoral Law in force, the mentally handicapped could also vote, even those committed to mental institutions, unless declared incapable by any court. Arts. 2.003 and 2.005 (16 L.P.R.A. § 3053 and 3055).

D. *Domicile*

The concept "domicile" is often mistaken for that of "residence," particularly in common language, and sometimes this incorrect synonym is even found in the technical legal language. The present Electoral Law, as well as those preceding it, have been no exception. Thus we see that art. 2.007 (16 L.P.R.A. § 3057), requires every elector to register "at any registration place in his legal place of residence" and item (h) of said article provides that, when filling in the registration application, the elector shall state the following:

> (h) Legal domicile, stating in the case of an urban zone, the municipality, name of the sector, *barrio* or urbanization, street name or number, block or house number as the case may be; in the rural zone, all of the above, and, besides, the name of the rural road closest to the residence, the kilometer and the hectometer of the closest highway.

It would seem that this provision supposes that the domicile is the person's place of residence, a specific place which may be identified by a street and house number, name of *barrio* or urbanization, etc. This is further stressed by the fact that, pursuant to art. 2.023(b) (16 L.P.R.A. § 3073(b)), one of the motives for striking an elector from the registration application lists is "(b) [t]hat the elector was not a resident at the address indicated in his application for registration on the registration date, nor on the date of the challenge." The same ground could be invoked to challenge an elector at the very moment he is going to cast his vote. See art. 5.034 (16 L.P.R.A. § 3234).

As we shall see, said supposition has nothing to do either with the concept of a person's domicile as it has been juridically accepted in Puerto Rico, or with the definition of said term made by the Electoral Law in order to determine

the place where an elector is entitled to vote. Article 2.004 (16 L.P.R.A. § 3054) of the Act provides:

> § 3054. Domicile of elector
>
> For the purposes of this Act the elector's domicile shall be his legal residence pursuant to the following guidelines:
>
> (a) Every person has a domicile.
>
> (b) There can be but one domicile.
>
> (c) The legal residence or domicile is the place where a person habitually resides when he is not called elsewhere to work, or for some other temporary purpose, and to which such person returns during his rest periods.
>
> (d) The legal domicile or residence may be changed by joinder of act and intent.
>
> (e) A domicile cannot be lost until a new one has been acquired.
>
> Provided that, any member of a military body or agency, department, or bureau of the Government of the United States of America shall not be deemed to have acquired domicile in Puerto Rico by the mere fact of being stationed or detailed in this Commonwealth, and thus, shall not be entitled to vote.

This definition clearly implies that a person may have his domicile at a place where he does not reside since "[t]he legal domicile or residence may be changed by joinder of act and intent," and "[a] domicile cannot be lost until a new one has been acquired." (Items (d) and (e) copied above.) From this, we can infer that a person having a domicile established where he resides may move his residence to another place and not lose his domicile at the first place until, together with the act of residing at the second place, there is the intention of staying on that

place, and that is when he would acquire a domicile at the second place. Due to the complexity the different factors may create in the determination of a person's domicile, and, in our case, that of an elector, we but agree that this is a mixed question of fact and of law, subject to judicial scrutiny. See *Fiddler* v. *Secretary of the Treasury*, 85 P.R.R. 302, 308 (1962).

Let us now examine the statutory and case law history of the concept since the adoption of the Political and Administrative Code in 1902, whose art. 11, 1 L.P.R.A. § 8, provides:

> § 8. Domicile
>
> Every person has in law a domicile. In determining the place of domicile the following rules are to be observed:
>
> 1. It is the place where one habitually resides when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
>
> 2. There can only be one domicile.
>
> 3. With respect to the jurisdiction of the courts a domicile cannot be lost until another is gained.
>
> 4. The domicile of unemancipated minor children is the same as that of their father, and after his death, of their mother.
>
> 5. The domicile of the wife is presumptively the same as that of the husband.
>
> 6. The domicile of an unmarried minor subject to guardianship is the same as that of his tutor.
>
> 7. Domicile can be changed only by the union of act and intent.

Before the Political Code was adopted, the first general election under the United States flag, the so-called Hundred

Days elections, were held, for which General Order No. 160, 1899 series, provided:

> VIII. An elector to vote at such elections shall possess the following qualifications:
>
> . . . . . .
>
> (c) Citizens or subjects of foreign countries possessing the foregoing qualifications will be permitted to vote at muni[illegible]i elections, provided they have resided in Porto Rico for five years next preceding the date of election and for the last six months of said period within the municipality where the election is held; and provided further, that they shall have made renunciation under oath of their foreign nationality, said oath being administered by the municipal judges or an army officer, and said renunciation to be accompanied by a declaration of their intention to become citizens of the United States.

This decree did not require the electors to have a domicile, and was limited to the concept of residence as such. The Registration and Election Law of May 7, 1906, and that of March 12, 1908, provided likewise. Said acts recognized the right to vote to "[e]very male citizen of Porto Rico, or of the United States, of the age of 21 years or over, on the day of election, who is not legally disqualified *and who shall have resided for one year next preceding the date of election in the municipality where the election is held. . . .*" (Underscore supplied.) They also provided that the elector was entitled to vote "in the election precinct where he is registered."

Despite the fact that said provisions refer to residence and not to domicile, this Court, in *People* v. *Menéndez*, 19 P.R.R. 364 (1913), decided that a school teacher who worked in Ciales from Monday to Friday, and then returned to his mother's residence in Manatí on Fridays, did not lose by reason of his work, his domicile in Manatí because he never

intended to change it to Ciales, and, hence, he was entitled to register and to vote in Manatí. This decision introduced the concept "domicile" in electoral matters. Said concept was for the first time established for electoral purposes through Act No. 79 of June 25, 1919, Law of Registration and Elections. This act did not depart from the path made by the previous laws insofar as it kept the residence requirement "for one year next preceding the date of the election in the municipality where the election is held," although its sec. 15 included the concept of domicile, adopted from the Political Code of 1902, as follows:

> For the purposes of registration, it shall be necessary for the person to have been a *bona fide* resident of the municipality where he seeks to register as a voter for at least one year prior to the date of election.
>
> The domicile which is the voter's legal residence shall be determined in accordance with the following rules:
>
> (1) Every person has a domicile.
>
> (2) There can be but one domicile.
>
> (3) Legal residence or domicile is the place where a person habitually resides when not called elsewhere to work or for some other temporary purpose, and to which such person returns at time of rest.
>
> (4) Legal domicile or residence may be changed only by joinder of act and intent.
>
> (5) A domicile can not be lost until a new one has been acquired.

The concept "domicile" in the 1919 Act being thus anticipated, it came to take the place of the concept "residence" of the previous law in Act No. 3 of October 5, 1965 (16 L.P.R.A. § 41). The definition of domicile adopted in the 1919 Act, and which we copied above, was included *fide*

literis in the 1965 Act, and in the Electoral Law in force, which regulated the 1980 general election. The provision of the act in force, art. 2.004 (16 L.P.R.A. § 3054), is copied in the first paragraph of this part of our opinion.

It bears noting that the concept "residence," which was limited by the first electoral statutes to its precise linguistic definition, has developed and, insofar as the exercise of the right to suffrage is concerned, has become the place where the elector has established his domicile, thus eliminating time and space restrictions. We have seen how our early electoral laws required the elector to vote where he had *resided* for at least a year before election day. The 1974 Electoral Code took the concept "domicile" from the 1965 Act and modified the one-year "residence" requirement and reduced it to four months. Its art. 4.002 (16 L.P.R.A. § 2132, Supp. 1975), provided:

> § 2132. Qualifications of voter
>
> Every United States citizen who is eighteen (18) years of age or over on the date of elections, domiciled in Puerto Rico, who is, on election day, duly registered in the electoral precinct where he has resided for four (4) months prior to said election, and who is not legally disqualified to vote, shall be a voter in Puerto Rico. The Electoral Tribunal may reduce the term of four (4) months taking into consideration the last date in which changes are permitted in the Registry of Voters, the administrative efficiency and the guaranties that should prevail against electoral fraud.

Said Code was repealed in 1977 by the present Electoral Law, which adopted the same provision but without including the residence requirement. Its art. 2.003 (16 L.P.R.A. § 3053), provides:

> § 3053. Qualifications of Electors
>
> Any citizen of the United States of America and of Puerto Rico, domiciled on the Island, who has attained

> the age of eighteen (18) on the date of an election, and has been duly registered for at least four (4) months prior to that date, and is not legally disqualified to vote, shall be an elector in Puerto Rico.

The act in force includes the residence requirement in art. 2.007 (16 L.P.R.A. § 3057), but the adjective "legal" has been added. This article governs all elector registration matters. It begins: "Every applicant for registration shall appear in person at any registration place *in his legal place of residence. . . .*" According to said article among the information that shall be included in the registration application, the "domicile" should be stated. See item (h) of said article, which we have cited above. Hence, the present act is clear when providing that the place where an elector should vote is where he has established his domicile.

Let us now see the case law history of the concept "domicile". We should point out that insofar as the concept has been defined in our Political Code, 1 L.P.R.A. § 8, and adopted in our special laws on electoral matters, the same should prevail over any other case law construction of the concept based on foreign case law, including that of Spain. We did not adopt our Political Code from Spain. We adopted it following the California Political Code of 1872, *Hernández* v. *Felici et al.*, 11 P.R.R. 391, 395 (1906), and the definition of domicile made therein is copied from art. 52 of the California Code. See 1 *Kerr's C. C. Codes of California* (2nd ed. 1920).

As we have already seen, the first case where this Court had the opportunity to pronounce itself on electoral matters was *People* v. *Menéndez, supra*. Although no definition of the concept was given in that case, the emphasis was on the elector's intent of not changing his domicile, so that his right to vote be recognized and he could vote where he did. See 19 P.R.R. 364. From that case on, we have not found any instance where the Court has seen the need of pronouncing itself on domicile matters as regards the right

to suffrage. However, this does not mean that domicile decisions on other areas are not applicable since, at any rate, the legislation has the same origin.

In *Pastor et al.* v. *Miró*, 34 P.R.R. 50 (1925), we decided that a person who was born in Spain but who was domiciled in Puerto Rico for 25 years, did not loose his domicile here when he moved to Spain and died there, despite the fact that in a letter written three months before his departure for Spain and six months before his death, he stated: "when I sail I desire to take with me what little I have in order to enjoy the balance of my life with you. . . ." In this Court's opinion, this evidence was not sufficient to show that he lost his domicile in Puerto Rico when he moved to Spain.

In *Carrero* v. *Del Castillo*, 41 P.R.R. 424, 425 (1930), this Court said:

> The place where a person actually lives is, prima facie, presumed to be his legal domicile, but actual residence is merely one circumstance and the presumption raised thereby is not conclusive. A domicile when once obtained or acquired is presumed to continue and the burden of proving a change rests on the party alleging it.

In *López* v. *Fernández*, 61 P.R.R. 503, 521 (1943), the Court stated that a person's expressed desire to move permanently to another place does not imply a change of domicile. We adopted the following quotation from *Restatement, Conflict of the Laws:* "For the acquisition of a domicil of choice the *intention* to make a home must be an intention *to make a home at the moment, not to make a home in the future.*" (Underscore in the original.) Further on, the Court pointed out that this is "the same as the statutory doctrine of domicile contained in § 11 of our Political Code." Based on this statutory concept, in *González* v. *Secretary of the Treasury*, 76 P.R.R. 128, 133

(1954), the Court stated that ". . . in order to acquire a domicile by voluntary choice, two requirements are essential, to wit: (1) physical presence and (2) intention to remain in the place chosen." Physical presence is an objective fact which is not difficult to prove. The intention to remain or *animus manendi*, *Carrero* v. *Del Castillo*, *supra* at 426, which "raises a change of abode to a change of domicil," is a subjective matter which must be determined based on the entire evidence, as it was done in *Lokpez*, *supra*. To the same effect, see *Foss* v. *Ferris*, 63 P.R.R. 547 (1944), and *Green* v. *Green*, 87 P.R.R. 797 (1963).

In *Fiddler* v. *Secretary of the Treasury*, 85 P.R.R. 302, 308 (1962), the Court stated:

> In his work Law of Federal Income Taxation, Vol. 3, p. 75, § 19.31, MERTENS distinguishes the terms "domicile" and "residence" as follows:
>
> > ". . . Any temporary place of abode may be a *residence*, but a *domicile* is a place of abode fixed and permanent or, at least, of indefinite duration. Time alone does not mark the distinction, for a temporary *residence* may extend over months or even years, while a *domicile* may be established by the first moment of occupancy. The question of *domicile* is a mixed question of law and fact; the question being largely one of intention to remain for an indefinite time." (Italics ours.)
>
> The Puerto Rican law requires something more than the intention to change the domicile. The Political Code provides in its § 11, 1 L.P.R.A. § 8(7), that:
>
> > "Domicile can be changed only by the union of act and intent."
>
> The taxpayer's intention as respects his domicile may be determined from his actions, declarations, conduct, and persistent intention to return to his estab-

> lished domicile. MERTENS, Law of Federal Income Taxation, *supra* at pp. 76-77. The taxpayer's intention with respect to his domicile may also be determined from his actions, such as: place where he votes and exercises his political rights, place where he pays taxes, place where his business offices and situs are established, place where he has social and fraternal connections, etc.

In *González* v. *Santiago*, 84 P.R.R. 366, 371 (1962), we find an even more concise explanation of what constitutes domicile; citing from *Bixby* v. *Bixby*, 361 P.2d 1075 (Okla. 1961):

> To effect a change in domicile, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place with intention of making it a permanent home.

In a more recent decision in *Praul* v. *Lafita Delfín*, 100 P.R.R. 34 (1971), we again drew a line between residence and domicile when we considered a provision of the Civil Code requiring a person to have "resided in the Commonwealth of Puerto Rico for one full year immediately preceding the action for divorce. . . ." Art. 97 (31 L.P.R.A. § 331). We did not need to probe further into the matter, but we cited, among others, *Fiddler* and *González*, *supra*, thus following the case law we have already cited.

This has been our case law to this effect. As we have seen, save for *People* v. *Menéndez*, there has not been any other case where the Court has had to deal with the question of domicile for electoral purposes.

The North American case law, in its state jurisdictions has dealt profusely with this matter, in its relationship with the right to vote. We shall take a look at it because of the persuasive value it may have. First of all we must point out that although state statutes almost exclusively use the

term "residence", said term has been equalized with the term "domicile", and it is in this sense that it is usually required. Note, *State Residency Requirements for Purposes of Voting: The Eligibility of Students to Vote in their College Communities*, 21 Am. U.L. Rev. 774, 780 (1971-72). See *Everman* v. *Thomas*, 197 S.W.2d 58 (1946); *Mitchell* v. *Kinney*, 5 So.2d 788 (Ala. 1942); *Sharp* v. *McIntire*, 46 P. 115 (Colo. 1896); *Coulombre* v. *Board of Registrars of Voters*, 326 N.E.2d 360, 362 (Mass. 1975); Note, *Constitutional Law, 26 Amendment-Residency Requirement and the Right to Vote*, 21 De Paul L. Rev. 843, 845 (1972); Note, *The College Voter and Residency Requirements*, 17 S.D.L. Rev. 131, 132 (1972).

There is no doubt that the residence or domicile of an elector is one of the elements the state may consider for establishing the requirements of a potential elector. See: *Dunn* v. *Blumstein*, 405 U.S. 330, 343-344 (1972); *Oregon* v. *Mitchell*, 400 U.S. 112, 122 (1970); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965); *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 51 (1959), *inter alia*. The state's interest in making such requirement is based on the need to prevent fraud and double voting, on preserving the integrity of the community where the election is held and excluding transient persons; and on ascertaining that only the persons directly concerned and affected by the election participate. See Note, *The College Voters and Residency Requirements*, *supra*; Note, *State Residency Requirements for Purposes of Voting: The Eligibility of Students to Vote in their College Communities*, *supra* at 778-779.

The *bona fide* residence requirement should be distinguished from the durational requirement. The first one limits suffrage to those who are classified as residents of the state. The second grants the right to vote only to those who have resided in the State for a fixed period of time. The strict scrutiny standard has been applied to the durational requirement. It would be inconsistent in Puerto Rico

not to apply it to the requirement of residence *bona fide*. Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis*, 93 Harv. L. Rev. 1491, 1497 (1980). When the state imposes a special and heavy burden on the citizen's mobility, the fundamental constitutional right to travel is violated. Since it has been decided that voting rights restrictions based on durational requirements are unconstitutional because they endanger the right to travel, the same arguments are applicable to the *bona fide* residence requirement. Note, *State Residency Requirements for Purposes of Voting: The Eligibility of Students to Vote in their College Communities*, *supra* at 787.

The person who alleges the change of domicile of an elector who is registered in the Register of Electors has the burden of proving the existence of such change of domicile. *Stucky* v. *Stucky*, 185 N.W.2d 656 (Ind. 1971); *Guerra* v. *Peña*, 406 S.W.2d 769, 775-776 (Tex. 1966); *Application of People Ex Rel. Croen*, 152 N.Y.S.2d 706 (1956); *Collins* v. *Collins*, 199 S.E.2d 626 (Ga. 1973); *Dilsaver* v. *Pollard*, 214 N.W.2d 478 (Neb. 1974); *Hubbard* v. *McKey*, 193 So.2d 129 (Miss. 1966), *inter alia*. There is usually a presumption in favor of the original domicile and the evidence to support the change must be clear and convincing. *Hamlin* v. *Holland*, 256 F.Supp. 25, 27 (E.D. Penn. 1966). That is to say, the contestant must present clear and convincing proof that the elector is not domiciled at the place where he intends to vote. *Guerra* v. *Peña*, *supra* at 776. Of all the formal acts which must be scrutinized for determining the domicile of a person, the act of registration and of voting is the most important, and although it is not necessarily conclusive, it is usually the most convincing and persuasive. *In Re Meyers' Estate*, 288 N.W. 35, 38 (Neb. 1939). See also, *Ex Parte Weissinger*, 22 So.2d 510, 514 (Ala. 1945). In *In Re Estate of Laudenslager*, 240 A.2d 477, 480 (Penn. 1968), the court pointed out that "less evidence is required to prove a continuance of a domicile than to establish a new domicile."

The name of an elector cannot be stricken from the Register of Electors on the basis of mere inferences or uncertainties. *Application of People ex rel. Croen*, 152 N.Y.S.2d 708 (1956). In the absence of fraud the benefit of doubt shall be exercised in favor of the right to vote in that town which the person regards as his home. *McGee* v. *Bragg*, 53 A.2d 428, 431 (N.H. 1947). This is so because for electoral purposes, the original domicile remains unaltered until a new one has been acquired. *Kay* v. *Strobeck*, 254 P. 150, 152 (Colo. 1927).

The change of the elector's domicile cannot be shown through hearsay evidence. *Collins* v. *Collins*, 199 S.E.2d 626, 627-628 (Ga. 1973). In *Atkinson* v. *Thomas*, 407 S.W.2d 234, 244 (Tex. 1966), the court required something more than a scintilla of evidence for establishing the elector's original domicile. It has been clearly established that the elector need not be physically present at all times in the district where he intends to vote. *Swan* v. *Bowker*, 281 N.W. 891 (Neb. 1938). The physical presence of an elector in the jurisdiction is not essential to the right to vote if he has acquired and retained his domicile there. *Pope* v. *Houle*, 149 So. 222, 224 (Ala. 1933); *Gray* v. *Main*, 309 F. Supp. 207, 217 (N.D. Ala. 1968).

Temporary absence from one's domicile for purposes of employment without the intent to abandon the hometown and acquire a domicile elsewhere permanently or for an indefinite time, does not forfeit the right to vote. *Wilkerson* v. *Lee*, 181 So. 296 (Ala. 1938). See also, *Martin* v. *Hefley*, 533 S.W.2d 521, 522 (Ark. 1976). A change of residence due to health reasons does not usually have the effect of changing the domicile. *In Re Meyers' Estate*, 288 N.W. 35 (Neb. 1939). In *Newburger* v. *Peterson*, 354 F. Supp. 559 (E.N.H. 1972), a New Hampshire statute disqualifying citizens from voting in the municipal elections if they had the firm intention of abandoning the town at a specific future date, was successfully challenged. The court ruled

that the strict scrutiny standard was applicable and that the indefinite intention requirement is unconstitutional because it violates the equal protection of the laws. Obviously, the mere fact of having a business place in a locality is not sufficient to establish a domicile. *Pope* v. *Board of Election*, 18 N.E.2d 214 (Ill. 1938). Neither does the postal number per se constitute evidence of domicile. See *Kyser* v. *Board of Elections of Cuyahoga County*, 303 N.E.2d 77, 80 (Ohio 1973), which established that the place where a person picks up his mail cannot be considered his home. Neither is a property title needed to show presence. The elector's rental of his living quarters is sufficient. *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970).

This case law rationale is rather similar to the one adopted and propounded by the American Law Institute in its *Restatement of the Law 2d; Conflicts of Law*, Vol. 1. Thus for example, the *Restatement* points out that for electoral purposes, the concept "residence" has been interpreted as being the equivalent of domicile. Sec. 1", at 46. Neither does it require costumary physical presence, and emphasizes the citizen's mental attitude as to which is his domicile. Sec. 16, at 63. Neither does the person acquire a domicile of choice by his presence in a place under physical or legal compulsion. *Ibid.*, sec. 17, at 66. The person alleging the change of domicile has the burden to prove it. *Ibid.*, sec. 20, at 81.

We have pointed out that our concept of domicile comes from one of the states of the Union. It does not have a civil law background. The State and federal courts case law we have cited and commented strongly tends towards recognizing that the domicile determines the place where an elector must vote. In doing so, said case law lays down rules on the evidence required for determining the domicile. These rules take into consideration the subjective element of intent of the elector rather than the objective one of customary residence.

We have seen the evolution of the Puerto Rican electoral legislation since the beginning of this century, and how the one year residence requirement has been left behind. The 1977 Electoral Law now in force requires "legal residence", which is the same thing as domicile, without a time limit. It is sufficient that the elector be duly registered in the place he has to vote "prior" to the date of the election. Arts. 2.003 and 2.007 (16 L.P.R.A. §§ 3053 and 3057, respectively). This legislation surely has taken into account the social and economical changes which have transformed our economy from an eminently agricultural one, which bound the people to the land, to an industrial economy which forces a great part of the population to be continuously moving to new working places.

Finally, we must repeat that the development of the democratic process in our country, and the historical experiences on the area of the electoral suffrage have created a profound awareness on the value of the vote, being it recognized as a fundamental franchise of the people in the Bill of Rights of our Constitution which orders that the laws shall guarantee that it be universal, equal, secret, and direct.

Once these factors and grounds have been considered, the approach to the validity of a vote cast at a certain place, from the point of view of the domicile of the elector, should be necessarily liberal. Based on these considerations we conclude that the following criteria should have been applied and shall prevail for the purpose of determining the domicile of an elector:

(1) That it is a mixed question of law and of fact;

(2) That the elector's place of residence is only one of the factors to be considered;

(3) That the most important factor is the elector's intention always bearing in mind that the intention to remain in a place *(animus manendi)* is one thing and

the purpose of making a domicile at a different place is another thing;

(4) That the temporary absence for work, study, illness of self or family reasons, does not deprive an elector of his domicile;

(5) That the elector must not necessarily be present at all times at his place of domicile in order to retain it;

(6) That having business, employment, social or economic relations, post office box, telephone number, or utility accounts at a certain place are factors to be considered but do not in themselves determine that a domicile has been acquired in that place;

(7) That he who alleges a change of domicile has the burden of proof;

(8) That there is a presumption in favor of the original domicile and place where the elector votes, and he who alleges that there has been a change of domicile must show it through clear, strong, and convincing evidence not affected by exclusionary rules.

When passing on domicile-based challenges, the Electoral Review Board in many cases ignored the elector's manifest intention, giving preference to costumary residence and physical presence requirements. It erred. When we consider each one of the cases further on, we shall make whatever rectifications are necessary pursuant to the above-stated standards and bearing in mind those regarding the value and the sufficiency of the evidence we mentioned under letter "A" of this second part of our opinion.

E. The validity of a ballot cast shall be upheld as long as the elector's intention can be reasonably determined

We have emphasized that the validity of a vote cast by an elector is presumed; that the contestant has the burden

of proof; and that the evidence to this effect must be clear, strong, and convincing. Part II A of this opinion.

In *P.S.P.* v. *Comisión Estatal de Elecciones*, 110 D.P.R. ——; 80 J.T.S. 92, we recognized the supremacy of the elector's clear intention, when marking his ballot, over any other literal construction of the statute as may frustrate the value of a vote cast. We acknowledge ". . . that the lawmaker cannot anticipate all the eventual possibilities that may arise from any situation in the future . . .", and we said that ". . . our supreme mission is to safeguard—by the preeminence of the law involved—those cases in which a literal and strict interpretation may raise grave constitutional objections and uncertainties." Ref. Bar. Asso. 1980-91, pp. 29-30. Therein we had to adjudicate the validity of a ballot cast by an elector who instead of marking it, as provided by law, under the emblem of the party of his preference and within the square where the emblem is printed, marked it outside the square and above the emblem. We decided that insofar as the elector's intention for voting for said party was clear, the vote could not be annulled. We said (80 J.T.S. 1742): "The crucial fact rests in determining if the mark clearly reflects the intention of the elector and not the accidental fact of it being incorrectly placed."

We ratify said rule. Its application furthers compliance with the constitutional mandate of guaranteeing the right to vote. This rule disposes of the aspect now under our consideration: that of a ballot cast by an elector which bears the following marks: an "X" under the emblem of the Popular Democratic Party, and the letter "F" right next to it, and a slash (/) under the emblem of the Puerto Rican Independence Party. See Annex "E".

The Commonwealth Election Commission unanimously decided that, in this case, the slash was inconsequential. However, it annulled the ballot because of the letter "F" written just next to the "X". The Popular Democratic

Party felt aggrieved and resorted to the Electoral Review Board claiming that the ballot was valid. It pointed out that with its decision, the Commission departed from the standard used in similar cases, and, as examples, cited a ballot cast in the precinct of Guayanilla where the elector made an "X" and wrote a "C" under the emblem of the New Progressive Party (exhibit 27 of the appellant), and another ballot where the elector voted for the New Progressive Party making an "X" and writing the letter "P" under the emblem of said party. In both cases the ballots were adjudicated as straight votes for said party.

The Review Board upheld the decision of the Commission but not on the basis of the issue raised. It disregarded the Commission's unanimous decision that the slash is inconsequential, and decided that since under the Electoral Law the slash and the "X" are valid marks, they rendered the ballot null. It invoked art. 6.002 (16 L.P.R.A. § 3262)[33] and Rule 32 of the Regulations for the 1980 General Election.[34] It did not consider what was the intention of the elector. This notwithstanding, we agree with the decision of the Board. The appeal is taken from the decision, not from its grounds.

Whenever clear, the elector's intention should be respected. In this case his intention is not clear because the

---

[33] The second paragraph of said article provides:

> A ballot shall not be adjudicated when it reflects a double voting for two opposing parties, in addition to the reasons for protesting ballots provided in section 3003 of this Act. These shall be the only reasons for refusing to adjudicate a ballot in the polling place.

[34] The above cited Regulations, R. 61, Handbook of Procedures for Polling Officials and Electoral College Coordinators, R. 32, recognizes as valid "any cross mark (X)", "check marks (√)" and dashes (—), periods (.), or circles (○) which are clearly distinguishable, or variations of these marks which clearly reflect the elector's intention.

elector made two valid marks: one for the Popular Democratic Party and another for the Puerto Rican Independence Party. Hence, the marks contradict each other.

Any attempt to determine the intention of the elector who cast this ballot will be necessarily based on conjectures. For example, it could be argued that the elector mistakenly began to make a cross (X) under the Independence Party emblem; or maybe he desisted and, before completing the cross (X), he decided to vote for the Popular Democratic Party and clearly did so by making a full cross under the latter's emblem. But the contrary could also be argued: that the elector voted for the Popular Democratic Party, changed his mind, and voted for the Independence Party by making a slash (/), which is also a valid mark, under this party's emblem, and writing an "F" next to the cross to indicate that said mark was false, that it was mistakenly made, etc.

It is true that the Commonwealth Election Commission unanimously considered that the slash mark (/) was inconsequential. It was thus stated by the Secretary of the Commission, Atty. Ruiz Roche, before the Review Board. However, it annulled the ballot grounded on the letter "F", and appeal was taken from this decision before the Review Board.

The Board was not dealing with a challenge of an elector where, as we have already pointed out (Part II B), it would only examine the ground alleged in the challenge in order to determine its validity. The ballot in question does not identify the voter and was timely protested. The Board was right in examining it as a whole and in drawing its own conclusions, as we are also doing in view of the fact that we are dealing with documentary evidence. *Inter alia*, *Díaz de Diana* v. *A.J.A.S.*, 110 D.P.R. —— (1980), 80 J.T.S. 95; *Caribe Crown* v. *Srio de Hacienda*, 108 D.P.R. 796 (1979); *Planned Credit of P.R., Inc.* v. *Page*, 103 D.P.R. 245 (1975); *Miranda* v. *Editorial El Imparcial, Inc.*, 99 P.R.R. 583 (1971); *Cooperativa Cafeteros* v. *Colón Colón*, 91 P.R.R. 361 (1964); *Central Igualdad, Inc.* v. *Sec. of the*

Treas., 83 P.R.R. 44 (1961); *Castro* v. *Meléndez*, 82 P.R.R. 556 (1961).

The fact that, in previous cases, a ballot containing a mark under the party's emblem, and also an initial which could be identified with one of the candidates of said party appearing on the ballot was accepted as valid would be a persuasive argument if we were dealing here with a ballot containing only those two marks, that is, a cross (X), and the initial under the party's emblem. But, in this case, there are too many marks. The elector's intention is not clear.

The decision of the Review Board, with regard to this ballot will be affirmed, and the same will not be adjudicated.

F. *Electors' disability*

An elector from the precinct of Río Grande who had undergone surgery could not because of this disability go up to the polling place. The polling place officers went down to her taking a ballot with them which she marked. Later on, the ballot was challenged by the Popular Democratic Party representative. The electors had already left the place and, therefore, she could not answer the challenge.

The Review Board correctly dismissed the challenge, and adjudicated the straight ticket to the New Progressive Party. The challenge in this case could not be considered because it was not made in the presence of the elector, thus giving her the opportunity to defend her vote. Apart from this, the fact that a person is disabled is not and cannot be a reason to challenge his vote. It is true that electors should vote at the corresponding polling place, and the law does not provide that polling officers may go out to take the vote of an elector who cannot go to the polling place. In this case, however, this was no problem and the officers action is commendable since in so doing they guaranteed the vote of a citizen, which is the most important thing.

The Popular Democratic Party has not repeated before us its challenge to the decision of the Board, the matter thus becoming academic. This notwithstanding, we stress the principle that physical disabilities do not constitute valid reasons to challenge a vote, and that situations as the one in controversy should be solved facilitating, insofar as possible and reasonable, that the disabled elector be given the opportunity to cast his vote.

III

Analysis of the Cases

We shall now examine separately and in detail the cases of each one of the electors whose vote is in controversy in the appeal before us. In doing so, we shall apply the standards we discussed in Part II of this opinion. We shall refer to each case by the name of the elector affected, also indicating the docket number assigned by the Electoral Review Board.

(1) *Roberto Pérez* (JR-80-281)

(2) *Nellie Cortés* (JR-80-277)

(3) *Maritza Pérez Cortés* (JR-80-277)

These electors form a family group. Mr. Pérez and Mrs. Cortés are married, and are Maritza's parents. The three of them voted in the precinct of Fajardo, and their votes were adjudicated to the New Progressive candidate Mr. Molina. These votes were challenged by the Popular Democratic Party under the allegation that they did not have their domicile in Fajardo but in Carolina.

The uncontroverted evidence established that the Utuado born Pérez Cortés spouses were married in New York in 1957. In 1969 they moved to Puerto Rico and bought a house in the municipality of Carolina, where they established their residence. About a year later, they bought a

gasoline station in Fajardo, managed by both spouses, but they kept their residence in Carolina. Sometime during the seventies, at a date which Mrs. Nellie Cortés de Pérez could not remember, they rented a house in Fajardo and moved to it, and they bought a house where they lived for a year. They sold that house in 1978, and returned to their original residence in Carolina, which they never sold. Their daughter Maritza "studied in Manpower" when they moved to Carolina. At present she works at a legal office in Santurce and studies in the Puerto Rico Junior College.

The spouses Pérez Corté lead a social life in Fajardo, where they have a gas station, and they plan to reestablish their residence in Fajardo in the future. They are thinking of buying an apartment in Dos Marinas.

The Board concluded that the spouses' domicile is at Fajardo. We disagree. The evidence which was not controverted shows that when the family established their residence in Carolina back in 1969, it also established its domicile there. They tried to change it to Fajardo, but they returned to Carolina three years ago, and have remained there. The purpose of changing their residence someday—yet unknown—to Fajardo does not turn them *ipso jure* into persons having their domicile in Fajardo. To have a domicile in one place is one thing, and to have the purpose of making a domicile there in the future is quite another thing. The *animus manendi* is where they have their residence at this moment. The challenges should have prospered.

With regard to Maritza, the Board refused to consider the challenge when it concluded, in its resolution, that "according to the testimony of Juan Gualdín Sosa, who stated that he was a member of the Popular Democratic Party in good standing, and who testified that he had been commissioned to serve the summons on Maritza Pérez Cortés, admitted that, originally, the summons issued to Maritza was for January 8, 1981, but, since he could not

serve it personally, and without notifying Maritza or anybody, he had changed the number 8 which appeared thereon for a 9; change which he made on his own, and which was the date when the witness testified. We conclude that, for summoning elector Maritza Pérez Cortés in these circumstances, it is insufficient at law, insofar as she has the inviolable right to be summoned, to appear, and to be heard at a public hearing in defense of the challenge of her qualifications as elector. In addition to this, in her case the contestant has no evidence against her." This statement is totally unaccurate. We have read the transcript of Juan Gualdín Sosa's testimony and we have not found that he said that he was "a member of the Popular Democratic Party in good standing" nor that he admitted having altered Maritza's summons. We infer that the Review Board mixed up the case maybe due to the irregular manner in which it was forced to work, and in view of its legitimate determination to decide the cases in the shortest possible time.

We have examined the summons and there is no 8 changed for a 9. Number 9 is nowhere to be found. In a clear handwriting, without any deletions, erasures, or overwritings the process server stated to have served the summons personally on the elector on January 7, 1981, so that she could appear, on January 8 of that same year. See Appendixes "F" and "F-1".

An examination of Juan Gualdín Sosa's testimony shows that Maritza was summoned according to law. He stated that, when he went to deliver the summons, he asked don Roberto, if Maritza was there, and the latter said yes. (Tr. Ev., p. 6107.) When he realized that Sosa was bringing a summons, Roberto Pérez refused to let him into the house, told him to go away, and threatened to kill him. (Tr. Ev., p. 6106.) Meanwhile, he saw a young lady in the house who said: "Daddy, let him alone, he comes from the Review Board. He is not of the Popular Democratic Party, I think he is from the Review Board."

In view of the father's threatening attitude, Sosa had to leave the summons with him, instead of in the hands of Maritza. In view of these facts, there is no doubt that the summons was sufficient at law. The party concerned prevented the personal service.

The Electoral Law is silent regarding the manner of serving a summons on an elector. However, its art. 6.014 (16 L.P.R.A. § 3274), which deals with the service of summons to a person whose election to office is contested, offers a guideline which may be applied to cases as the one under our consideration. Said article provides:

> The notice, brief and answer prescribed in this section shall be served by any person competent to testify by delivering them, in person, to the parties concerned or their electoral representatives, *or by leaving them with any person over sixteen years of age at the residence or office of the person to whom* they are addressed. For the purposes of this section, the electoral representative of a candidate shall be the Local Commission member of the precinct where he resides, that represents his party or his candidacy.

The summons of an elector cannot depend on the elector's refusal to be summoned. "Personal" service does not mean hand delivery. It sufficies that the elector be duly identified, so that the latter may have sufficient notice of the matter, and that the summons is made available to him. Upon leaving the summons at Maritza's house in the abovementioned circumstances, the process server complied with the personal service requirement.

The Board also erred on the merits. The testimonies given by Nellie Cortés—Maritaz's mother—and Hipólito Suárez Velázquez, furnished abundant, strong, clear, and convincing evidence to show that Maritza has had her domicile in Carolina with her parents since they came to Puerto Rico in 1969, and that she has resided there during nine

out of the eleven years she has been living in this country, including the years after 1978.

Neither the vote of Maritza Pérez Cortés, nor those of her parents, may be counted in favor of Mr. Molina's nomination for Representative District No. 35.

(4) *Carlos Rosado Santana* (JR-80-279)

The case of this elector is rather similar to that of the Pérez Cortés family. Rosado Santana voted in precinct No. 102 of Ceiba for the Popular Democratic Party and its candidate Cepeda. He was challenged by the New Progressive Party because he did not have his domicile in Ceiba. Contrary to the Pérez Cortés' case, the Review Board upheld the validity of the challenge. It acted correctly.

During the hearing, Heriberta Pérez Rivera, José A. Añeses de la Rosa, and Ernestín Muñoz, testified against the challenged voter.

Heriberta Péez challenged Carlos Rosado's vote on election day. She testified that the elector has been living in Aguadilla with his wife during the last five or six years. He visits his mother at Ceiba every month. He owns a house in Aguas Claras, Ceiba, where his in-laws live. She was her neighbor in that housing development. She has never been to Rosado's house in Aguadilla, but she knows he lives there because she has been told so by his relatives whom she knows very well.[35]

José A. Añeses de la Rosa is the Executive Director of the Authority for the Administration and Development of Punta Borinquen, and is also the Manager of the Industrial Corporation of P.R., which now administers the former army base at Ramey. He is in charge of the lease of living quarters there. He testified that Carlos Rosado Santana

[35] Although this is a hearsay statement, it was established by direct evidence.

has been leasing a property therein since October 21, 1975. The house he occupies is furnished. The persons who have leased apartments at Ramey come from all parts of Puerto Rico. (Tr. Ev., p. 1896.)

Ernestín Muñoz testified that he has his residence at Ramey, 114 Grubes Street. He knows Carlos Rosado Santana and his wife Elsie. They reside at Ramey. He and Carlos were co-workers. Elsie also works in Aguadilla.

The elector appeared to defend his vote. He alleged that he lived on Parcel # 63 in Aguas Claras, Ceiba. He testified to be maintenance Manager at Dade Diagnostric in Aguada. While he works, he resides in Ramey, Aguadilla. He has been leasing a house there for the last five years. He owns a property in Aguas Claras, Ceiba. He has had it for nine years. He owns another property in Barrio Mangó, Ceiba. He travels to Ceiba three times during the month. He stays at his house in Aguas Claras. At present, his mother-in-law lives there and takes care of the house.

This elector was born in Fajardo, and was raised in Ceiba since he was nine years old. He began working at Roosevelt Roads from 1967 to 1972. From there he went to Humacao to work as maintenance supervisor for Tecnicom Electronics, but kept his residence in Ceiba. He remained there until 1975. Then he went to work as maintenance manager for Dade Diagnostic in Aguada. He accepted the job because he was offered a yearly salary of $16,000.

His children go to a private school in Aguadilla. He has a bank account in Aguada. At present, he earns $30,000 a year. He travels to Ceiba three out of the four weekends of the month in order to visit his mother, go fishing, and supervise a tire shop he has there. He began doing business three and a half months ago, and the establishment is managed by a brother-in-law.

His wife Elsie Cintrón testified in his favor. She admitted that she also works in Aguadilla for a computer

company. She has a bank account in Aguado. They own a boat anchored in La Parguera, where they have leased a house.

Although Carlos Rosado Santana has kept his contracts in Ceiba, he changed his job in order to work for Dade, in Aguada, because he was offered a higher salary. He has been living there since 1975. His wife works in Aguadilla and his children go to a private school there. Considering the long period of time the elector has been living voluntarily outside Ceiba, we deem that the evidence established the *animus manendi* of staying in the Aguadilla area.

This is not the case of a person called by his corporation to work at a place other than his domicile. In this case, the worker himself decided to change jobs and chose to abandon his position at Tecnicom in order to obtain a higher salary with Dade in Aguada. In so doing and in remaining outside Ceiba for a lapse of five years, he established his domicile in Aguada and lost the one he had in Ceiba. The Board's resolution annulling the vote for lack of domicile at Ceiba, should be affirmed.

(5) *María Soto Sanes* (JR-80-279)

(6) *Norma Soto Sanes* (JR-80-279)

These electors voted in the precinct of Vieques for the Popular Democratic Party and its candidate Cepeda. They were challenged under the allegation that they did not have their domicile there.

The only witness brought to support the challenge was Marcelino Soto Sanes, the electors' brother. He testified that Norma used to work as a teacher in Vieques and that, when her mother died in 1977, she came to Puerto Rico. (Tr. Ev., p. 1449); that Maria worked for the Municipality of Vieques under the CETA plans, that she resigned and got a job at a hardware store in Vieques. She remained there for a while and, when her mother died, she went to

Puerto Rico. He said that his parent's property was abandoned and that nobody lives there. On cross-examination, he admitted that his mother's house is furnished and that there is a refrigerator, a television set, and that one of the sisters has an automobile in Vieques. When Norma and María lived in Vieques, they used to stay at their mother's home.

María Soto Sanes appeared to defend her vote. She stated that she had taken a secretarial course in Vieques. She had worked in Vieques with General Electric, the Municipality of Vieques, at a hardware store, and in a shirt factory. The last time she worked in Vieques was in 1977, in the shirt factory. She had to quit her job because the factory shut down. (Tr. Ev., pp. 1461-1462.) She lived at her parent's house in Vieques. When her mother died, she was working at the hardware store, later on she went to work at the shirt factory. When the factory shut down in 1978, she could not get another job in Vieques and had to move to the Island because she had nothing to live on. At present he has a job with legal services.

The witness stated that she has her residence in Vieques. She goes to Vieques every weekend. She has rented an apartment in Río Piedras, which she shares with her two sisters. She has an automobile in Vieques. She stays at her parent's house. She pays the utility bills of the house in Vieques. She denies to have had the intention of abandoning Vieques as her place of residence. She has a bank account in Vieques. With regard to her brother, she said that the relationship between them has not been very good since the lands they own in Vieques were divided.

Norma Soto Sanes also appeared to defend her vote. She testified that she resides in Vieques and that she works for ASPIRA de Puerto Rico at Carolina. She has been working there since August 8, 1980. During week days she stays in Río Piedras at an apartment she has rented and shares with her sisters, and she goes to Vieques the weekends she does not have to work.

She is registered in Vieques. In 1978, she had to go to the University of Puerto Rico to work for her master's degree. Some of her belongings are in Vieques at the house that belonged to her parents. She returns to Vieques during her vacations and rest periods. Her job is not permanent. She is on a one-year contract.

Witness Rosa Camacho testified in behalf of the electors. She said that they live in Vieques (Tr. Ev., p. 1495), but that they work in Río Piedras. They travel to Vieques almost every weekend. They stay at the house that belonged to their parents. She lives at about 150 feet from their house.

Despite the evidence brought, the Board concluded, following the preponderance of evidence standard, that the electors have their domicile in Rí Piedras. This decision cannot prevail. The evidence was not strong, nor clear, nor convincing to justify the elector's lack of domicile in Vieques.

The mere fact that they reside in a rented apartment Río Piedras during week days, is not per se evidence of the lack of domicile in Vieques.

The electors' acts show the contrary. They have property in Vieques. Every weekend they travel to Vieques. The only reason why they have left the district is because of the need to get a job.

When defining the legal residence or domicile, the Electoral Law expressly provides that it "is the place where a person habitually resides *when he is not called elsewhere to work, or for some other temporary purpose, and to which such person returns during his rest periods.*" Art. 2.004(e), 16 L.P.R.A. § 3054(e).

These electors are physically absent from Vieques due to their work, and return there during their rest periods. Even under the preponderance of evidence standard, their lack of domicile in Vieques has not been established.

(7) *José Luis Castaño* (JR-80-279)

This elector cast his vote in the precinct of Vieques and was challenged by the New Progressive Party on the ground that he was not domiciled in Vieques. The Review Board upheld the challenge.

The only evidence to support the challenge consisted of the testimony of Néstor Hiram Tirado Rosa (Tr. Ev., p. 1502 *et seq.*), who stated that he has lived all his life in Vieques; that he has known José Luis Castaño since he was a child and that he does not have his residence in Vieques; that Castaño works for Vieques Air Lines, with offices at the Isla Grande Airport in San Juan; that he does not know where Castaño lives; that the last time he saw him was during the elections; that he has been outside Vieques for seven or eight years; that the elector is divorced and that his parents live on Víctor Duteil Street in Vieques.

The elector appeared to defend his vote. He stated that he has been working for Vieques Air Lines for about five years; that a present he is the airline's sales manager in San Juan, and that he has his office at the Isla Grande Airport. (Tr. Ev., p. 1522.) When he started working with said firm, he lived in Vieques, at 14 Víctor Duteil Street. He resided there with his parents. His relocation in San Juan is due to the fact that he is studying at the Universidad Mundial (World University). He plans to obtain a Bachelor's Degree in Public Accounting. He requested a job transfer in November, 1976. He is lodged in Highland Park, Río Piedras, in the house of an aunt. He does not own property in the Metropolitan area.

He voted in Vieques in the 1976 elections. He has an electoral identification card and he got his photograph made in Vieques. He travels to Vieques all weekends that his college studies permit. He considers that he has his domicile in Vieques, where he goes during his rest periods,

and during vacations. He has a 12-year old daughter who stays in Vieques with her grandparents. Vieques Airlines furnishes him free air transportation. When he gets his college degree he will return to Vieques.

The attempt to challenge the witness was based on the presentation of a sworn statement furnished by N.P.P. officers and made by the elector himself before notary Rafael Rosario Hernández, where he admits to have his residence in Río Piedras. However, during the cross examination the elector explained that he did not sign the document until the notary added, which he did, the following to the sworn statement:

"In order to complete the foregoing statement, I want to add that I have been living in Río Piedras during the last 4 years *because*, during all that time, I have been a student at the College of Business Administration, Universidad Mundial, Hato Ray Campus." (N.P.P. Exh. No. 18.)

His father Zoilo Castaño testified in his behalf. He said that his son resides with him in Vieques. His wife and José Luis' daughter Sharon also live with him. His son travels to Vieques every weekend.

The evidence brought before the Board establishes that the elector has lived outside Vieques during the last 4 years. However, said evidence did not prove the *animus manendi* of staying in the metropolitan area. On the contrary, it clearly appears that the elector works for a Vieques company, has a minor daughter who resides in Vieques, and returns there almost every weekend. He registered to vote in Vieques, he considers that his domicile is in Vieques and he will return there once he finishes college.

The very sworn statement brought by the N.P.P. to show that the elector resides in Río Piedras corroborates further that he does not have his domicile there because the elector expressly stated that he was living there because

of his college studies. His *animus revertendi* is to return to Vieques after he gets his bachelor's degree.

The law in force provides that "the legal residence or domicile is the place where a person habitually resides when he is not called elsewhere to work, or for some other *temporary purpose*, and to which such person returns during his rest periods." The elector is physically absent from Vieques due to his college studies. He has not acquired a domicile in San Juan and, hence, he has not lost his domicile in Vieques. It is impossible to lose "a domicile until a new one has been acquired."

After applying the standard of strict clear, strong, and convincing evidence to annul the vote of an elector, we conclude that the Board erred in declaring that José Luis Castaño did not have his domicile in Vieques. His vote shall be counted for candidate Cepeda for whom he voted.

(8) *Awilda Moringlane Encarnación* (Case JR-80-279)

Elector Awilda Moringlane Encarnación voted in the Precinct of Vieques for the Popular Democratic Party and its candidate Cepeda. She was challenged because she did not have her domicile there. The evidence to support the challenge consisted of the testimonies of Genaro Moringlane, Awilda Feliciano, and Angel Laboy.

Genaro Moringlane stated that he was the father of the challenged elector, whom he has not seen in Vieques during the last four years. He saw her when she came to vote, and he himself challenged her. On cross-examination, he admitted that Awilda's children, of nine and seven years of age, respectively, reside in Vieques with their grandmother since they were born; that he lives at about a mile and half from that house. He also testified, based on information furnished by the children, that Awilda lives in Santa Cruz. Before going to Santa Cruz, she used to live in Vieques, and she left when the factory where she worked shut down.

N.P.P. Electoral Commissioner Awilda Feliciano testified that her work consisted in verifying whether the electors lived in Vieques. She knows Awilda Moringlane because they went to school together. She saw her during the elections. She admitted that Awilda visits her mother in Vieques, but she could not remember any dates. In conversations had with her, she heard that Awilda lives in Santa Cruz.

Angel Laboy, resident of Santa Cruz, testified that he knows elector Awilda Moringlane because her father is a cousin of his. He has seen the elector in Santa Cruz. She has been living there for a year with her husband Chago Herrera. She works there at a watch factory.

Awilda Moringlane Encarnación appeared to defend her vote. She affirms that she has no relationship whatsoever with her father Genaro Moringlane, and that he "begot her," and nothing more, because he did not raise her. She has three children, 12, 11, and 4 years old. (T.E., p. 1402.) They live in Vieques with her and her mother. She has always resided in that house. Her husband works in Santa Cruz. She stays two weeks there with her husband, and two weeks in Vieques with her children.

At present she is not working. Her husband supports her. She receives the child support for her children, born from other marriages, at the Police Headquarters in Vieques. She worked for three years at a watch factory in Santa Cruz, but that was seven years ago. She does not have any property in Santa Cruz, nor does she pay taxes there. She has always voted in Vieques.

Algeo Caraballo testified in her behalf. He stated that he knew Awilda since she was born. He lives accross from her and her parent's house in Vieques. He expressly asserts that she resides in Vieques. He has seen her there with her children. She sometimes travels to Santa Cruz job-hunting in order to support her children. She has been

doing this for a long time, weekly or bi-weekly. He does not know what her job is in Santa Cruz. Awilda and her father have no relation whatsover.

Doubtlessly, when the standard requiring clear, strong, and convincing evidence to annul a vote is applied, the Board's determination that the elector does not have her domicile in Puerto Rico cannot prevail. This elector spends the same amount of time in Vieques and in Santa Cruz. Her children have lived in Vieques since they were born. She has not acquired a domicile in Santa Cruz.

The testimonies brought to support the challenge are not sufficient, even under the preponderance of evidence standard, for rebutting the presumption of validity of this elector's vote. Her father's testimony is of doubtful credibility because of the affective distance between father and daughter to the point that he does not know her children, who are his grandchildren. He does not know that they are three, nor their age, despite the fact that he lives a mile and a half from the house where they live with his ex-wife, their maternal grandmother. The other testimonies offer only generalities on which to speculate, but cannot be taken as a basis to make a permissible inference having enough probative value to clearly and convincinly show that the elector has acquired a domicile in Santa Cruz, thus losing the one in Vieques.

The ballot of this elector shall be counted, as voted, for the Popular Democratic Party and its candidate Cepeda.

(9) *Juan H. Carrillo* (JR-80-279)

Insofar as sufficiency of the evidence is concerned, the case of this elector is even more problematic than that of Awilda Moringlane Encarnación. Carrillo voted in Precinct No. 102 of Ceiba and was challenged by the New Progressive Party because he did not have his domicile there. The elector denied the challenge and affirmed that he has lived in Río Abajo, Ceiba, since 1969.

The only evidence adduced to rebut the legality of the vote and support the challenge was the testimony of Carmen Delia Morris, to the effect that she went three times to the elector's residence in Barrio Río Abajo to deliver his electoral identification card, and found it abandoned. Nobody knows where he has his domicile now, nor where he moved.

We need not comment on this. Not even under the preponderance of evidence standard would this be sufficient to establish that the elector does not have his domicile in Ceiba. The Review Board's decision upholding the challenge will be reversed, and the ballot shall be counted as it was marked, that is, in favor of Cepeda and his party.

(10) *Sonia Becerril* (JR-80-279)

As was the case with Juan H. Carrillo, elector Sonia Becerril was challenged by the New Progressive Party because she was not domiciled in Precinct No. 102 of Ceiba where she voted for the Popular Democratic Party and its candidate Cepeda.

The only testimony brought against her was that of Sergio Félix Pérez, who stated that he knew Sonia Becerril because she used to live four doors from him at the Villa Flores Housing Development in Ceiba. He said that she moved from there to Santa Cruz.

During his cross-examination he stated that he was not an American citizen. That he was born in Santo Domingo. He said he saw when the elector brought her belongings back from Santa Cruz to Puerto Rico 18 or 20 days ago; she brought her car, beds, clothes, stove, and personal belongings. Right now she lives in Villas del Pilar, in Ceiba. They are squaters. She testified that she stayed in Santa Cruz for only seven or eight months.

The elector appeared and testified in defense of her vote. She stated that she lives at Villas del Pilar Housing De-

velopment in Ceiba. By election day, she lived in Villa Flores Housing Development also in Ceiba. She lived there since December 1978. She does not work. Her husband is a welder and worked in Santa Cruz from January to November 1980. At present he also resides in Puerto Rico. She admits that she traveled to Santa Cruz and that she sometimes stayed there for a couple of weeks. She denies having resided there.

The Board upheld the challenge and annulled the vote cast by Sonia Becerril. At the most, the facts in this case show that the voter temporarily resided in Santa Cruz between January and November. The law is clear when it provides that a domicile is not lost until a new one has been acquired. In this case, elector Sonia Becerril did not acquire a domicile in Santa Cruz. The *animus manendi* never existed.

A four month residence in Santa Cruz due to her husband's temporary job did not bear the effect of cancelling her domicile in Puerto Rico. Since she had not lost her domicile in Ceiba, her vote cast within District No. 35 is valid and should be counted in favor of the Popular Democratic Party and its candidate Cepeda.

(11) *Wanda Cotto Cantres* (JR-80-279)

This elector exercised her right to vote in Ceiba and was challenged by the New Progressive Party because she was not domiciled there. She denied the challenge and adduced that she moved to Loíza three months before election day.

The controversy revolves around the date when the elector moved to Loíza. All persons who were residing within District No. 35 by July 6, 1980, could vote in said electoral district. 16 L.P.R.A. § 3066.

Contestant Gilberto Vera Alvarez testified that he resides in Villa Flores Housing Development in Ceiba. He knows Wanda Cotto. She used to reside on the same block

where he lives. She lived there for about eight years and in April 1980, she moved to Loíza. He does not know where in Loíza did she move to. Her house in Villa Flores is sometimes occupied by a brother of hers. The rest of the time it is empty. At present she lives with a man in Loíza. Before this, she lived with him in Ceiba.

The elector appeared to defend her vote. She admitted to be living with her concubinus and that, at present she lives in Loíza, Medianía Baja, Parcelas Suárez, Calle 8. She has been living there since September 22, 1980. Before that, she used to live in Villa Flores Housing Development, Ceiba. She had lived all her life in Ceiba. At present her brother resides at the house in Villa Flores. She has two daughters who were born in Fajardo. Her concubinus' name is Miguel Feliciano Herrera; he works at El Comandante as horse trainer. She has been living with him for a year. At first they lived in her house in Ceiba, then they moved to Loíza in order to live nearer to the racetrack.

The house in Loíza was owned by the elector's father. He and her grandmother lived there. They died in April and February respectively. She did not move in April because a man from Loíza was living there taking care of the house. She remembers that she moved in September because the schoolyear had already started in August and she was afraid that her children would not be accepted at the Loíza school. She had her electoral photograph, but they would not let her vote. She had to wait from 10:00 in the morning to 3:30 in the afternoon in order to vote. She finally cast her vote in a closed polling place.

Vilma Correa de Jesús testified in behalf of Wanda. She lives in Loíza, two doors away from Wanda's present residence. She met Wanda in September at a party rally. That was the day before the last registration. At that time Wanda told her that she had moved to Loíza three or four days before. On cross-examination, she reaffirmed that

Wanda came to live in Loíza in September. She knows it because Wanda is her neighbor.

Based on these testimonies, the Board concluded by preponderance of the evidence, that Wanda Cotto could not vote in Ceiba. Even based on the preponderance of the evidence standard, we deem that Wanda Cotto's vote should have been validated. She furnished information to exactly determine the date in September when she moved, and a witness was brought who corroborated that she had moved on that month. The contestant's testimony—which is the only evidence—is not convincing nor sufficient to annul the elector's vote. It shall be adjudicated to the Popular Democratic Party and its candidate Cepeda.

(12) *Lydia Cardona Lebrón* (JR-80-279)

This elector voted in the precinct of Luquillo for the Popular Democratic Party and its candidate Cepeda. She was challenged because she did not have her domicile in Luquillo. She denied the challenge.

The challenge was upheld by the Electoral Review Board based on the sole testimony of Providencia Tapia who said she lived in Barrio Juan Martín, Luquillo, four doors away from the elector's property; that the elector has not been living there since late 1976 or early 1977; that the elector's husband told her that she lived in Berwind Country Club.

In her testimony in defense of her vote, the elector said that she used to live in Barrio Juan Martín, Luquillo, and that she now lives in Río Grande, and that her address is Calle 12 N 640, Alturas de Río Grande. She denied that she had lived in Berwind Country Club. She has a daughter with Leukemia who receives treatment at the Río Piedras Medical Center.

Providencia Tapia's testimony that she knows that the elector lives in Berwind Country Club is hearsay. On the

other hand, it was flatly denied by the elector who said that she had never lived there. The Electoral Review Board had to believe either the hearsay testimony or that of the elector. It decided to believe the former. We cannot accept that said hearsay evidence was enough to annul the vote, much less when confronted with the elector's categorical denial.

It bears noting that the precinct of Río Grande, where the elector resides, is part of Representative District No. 35 and that, hence, the challenged ballot should be adjudicated to the candidate for repesentative for said district, that is, to Mr. Cepeda for whom she voted.

(13) *Nancy Maldonado Cruz* (JR-80-279)

This elector voted in the precinct of Vieques and was challenged by the New Progressive Party for alleged lack of domicile. The elector denied the challenge.

Migual A. Bonano, Irma Inglés and Francisco Ramos Quiñones testified in support of the challenge.

Migual A. Bonano testified that he knows Nancy by sight. He has resided in Vieques for 31 years. He had not seen the elector in Vieques for quite a long time. When he saw Nancy on election day, he challenged her. He knows that she does not live in Vieques based on an information furnished to him during the 1980 census.

He admitted that he personally does not know whether or not Nancy lives in Vieques.

Irma Inglés testified that in a 15-minute conversation she had with Roberto Tapia—Nancy's ex-husband—he told her that they had separated seven months before and that she was residing in Humacao.

Francisco Ramos Quiñones also testified against her. Nancy was his nephew's wife. He says that Nancy took a small station wagon with her from Vieques to Humacao more than five months ago. He does not know where does

she reside in Humacao. It has been about 8 months since his nephew does not live with her. During the cross-examination he admitted that he did not see when the automobile was loaded on the ferry. He said that he was told so. He also admitted that he does not have personal knowledge that she lives in Humacao. He said that her husband told him so.

The elector appeared to defend her vote. She admitted that she works in Humacao, at a "bar restaurant," and that she stays in Humacao during working days, in Luis Peña Street. This notwithstanding, she testified that she lives in Vieques at a rented residence at Prudencio Quiñones Street. She lives with her husband Robert Tapia Ramos. She pays the utility bills in said residence. She has been working in Humacao for two months and residing there part of the week for the last four and a half months. She used to work at a factory in Vieques, but it was a seasonal job from which she was laid off. She travels to Vieques every week on her days off and returns there during her rest periods. She considers that her domicile is in Vieques. She registered for voting at Vieques. She separated from her husband long ago, but they kept seeing each other. They were divorced but were thinking of getting married again.

Roberto Tapia Ramos testified for the elector. He asserted that he works and lives in Vieques. He resides at Prudencio Quiñones Street. His wife pays the rent and utilities in said residence. She comes to Vieques every week on Mondays and Tuesdays. He admits that when he finishes his work, he plans to move to Humacao in order to be with Nancy. She moved to Humacao at the end of June or July.

The Board annulled Nancy Maldonado's vote because she resided in Humacao on election day. This decision cannot be upheld.

All the evidence brought in support of the challenge is chiefly hearsay. Nobody can tell exactly when did Nancy

move to Humacao. On the other hand, the elector's evidence established that, at the time she testified before the Board (between December 10, 1980, and January 9, 1981) she had begun to work in Humacao two months before and had resided there part of the week during the last four and a half months. This places her in Humacao during the month of September. Her husband stated that she went to Humacao at the end of June or July. Since these are the only reliable dates, it is evident that she moved within the four months preceding the election. Hence, she could vote in Vieques in the 1980 election.

Neither does the evidence brought establish that she changed her domicile. Her absence from Vieques is due to her failure to find a stable job there. A four-month stay in Humacao does not establish per se a change of domicile. The law is clear in providing that a domicile is lost only when a new one is acquired. Said change can only take place by the joinder of act and intent. No evidence appears from the record to support the proposal that the elector has had the intention of changing her domicile to Humacao At the most, what we can conclude is that the fact that she has failed to find a job in Vieques has forced her to look for one elsewhere. In this case, the presumption of domicile has not been rebutted. The elector's ballot should be adjudicated as she marked it, that is, to the Popular Democratic Party and its candidate Cepeda.

(14) *Jesusa Viscarrondo Díaz* (JR-80-279)

This elector was challenged by the New Progressive Party because she did not have her domicile in Vieques, where she voted. The elector denied the challenge.

Ileana Pimental and Manuela Santiago testified in support of the challenge.

Ileana Pimental testified that she lives at Barrio Pueblo Nuevo, Vieques. She knows Jesusa Vizcarrondo because,

when she began working for the Municipality of Vieques, Jesusa worked for the Right to Employment Administration and because she was a Popular Democratic Party candidate for the Vieques Municipal Assembly. She also had contact with her when she worked in the census and with the electoral identification cards. Jesusa lived in Barrio Leguillu. She did not see Jesusa in Vieques after May 1977. Since that date, she had neither seen her nor her husband Daniel Ochart, who has a bar restaurant in Vieques. During the census, she was told that Jesusa lived in La Cerámica, Carolina. Regarding the delivery of the electoral identification cards, she went to Jesusa's house during April and May, but she was not home. The neighbors told her that she no longer lived there. Nobody lived in the house.

During the cross-examination, the witness admitted that she saw Jesusa working in her same electoral unit as polling place officer. She also saw the elector's husband two days before the election and was invited to a Christmas party in her residence at Vieques. She also admitted that when the census was made, the house still had electricity, and she saw Jesusa in Vieques during the last days of the Populares' campaign.

Manuela Sanitgao stated that she met Jesusa when the latter was Payroll Supervisor for the Municipality of Vieques. She also met her when they both were Municipal Assemblywomen during 1977. She was told that Jesusa had moved to Carolina. She has not seen her since May 1977. Neither has she seen Jesusa during the last few months. She only saw her during the Patron Saint festivities in 1977 and 1978, when she opened a "little restaurant" at a stand. They could not give her the electoral card because she was not home. Her house in Vieques has remained closed.

The elector appeared to defend her vote. She testified that she had been a member of the Vieques Municipal Assembly until January 1978. She admitted that she moved

from Vieques to Carolina on that year. She moved there in order to take care of her mother and of a sister's daughter who is mentally disabled. She had to move as a result of her father's death in 1979, for someone had to take care of her mother and niece. She kept the property she had in Vieques. She did not sell or rent it. She understands that her domicile is in Vieques. The whole family has been living in Vieques since July 1980. She does not intend to return to Carolina. She did not make an electoral transfer to Carolina because she always intended to return to live in Vieques.

From the testimonies given it appears that the elector has held several government positions in the Municipality of Vieques. She had to leave her home temporarily to take care of her mother and of a disabled niece. Her *animus revertendi* is clearly established by the fact that she has been living in Vieques since July 1980. She did not request a transfer because she intended to stay in Vieques. The fact that she was physically absent for a couple of years does not show that she was not dimiciled there.

The Electoral Law provides that the legal residence or domicile is the place where a person habitually resides *when he is not called elsewhere* to work or *for some other temporary purpose*, and to which said person returns during his rest periods.

Nobody has contradicted the fact that she returned to live in Vieques in July 1980. The acts of keeping her house in Vieques furnished, with electricity and unrented, together with her physical presence in the District since July, show that she intended to keep her domicile in Vieques. Her temporary absence did not deprive her of that domicile. "A domicile cannot be lost until a new one has been acquired."

(15) *Lucía Avila* (JR-80-279)

Elector Lucía Avila was challenged by the New Progressive Party because she was not domiciled in Vieques where

she voted. An examination of her ballot (Exh. 75, N.P.P.) shows that she was challenged by Joaquín Santos because she "resides in Fajardo." She answered denying the challenge.

Manuela Santiago and Joaquín Santos appeared to support the challenge. Manuela Santiago testified that Lucía moved from Vieques some years ago. She does not know where to.

Joaquín Santos testified that he has known Lucía for 10 or 12 years. She left Vieques in 1978. He does not know where she lives now.

Based on this evidence the Board annulled the elector's vote. The challenge adduces that she lives in Fajardo, precinct which is comprised within District No. 35. Nobody can tell precisely where does she live now. Even if it is true that she lives in Fajardo, her vote counts for District No. 35.

We cannot understand why the Board annulled this vote based on the deficient evidence presented.

Apart from the fact that this evidence is weak and unsatisfactory under the standards we have expounded above, it bears noting that Fajardo, which is her place of residence as it appears from the challenge, is a precinct comprised within Representative District No. 35 and therefore, the vote could not be annulled with regard to the candidate for representative of said district. The Board's decision shall be annulled and said elector's vote shall be counted as valid for candidate Cepeda.

(16) *Carmen Elías Medina* (JR-80-279)

This elector was challenged by the New Progressive Party because she was not domiciled in Río Grande where she voted for the Popular Democratic Party and its candidate Cepeda. The elector denied the challenge on the back of the ballot.

Aníbal Santiago testified to support the challenge. He lives in Los Maestros, Río Grande, and was the challenged voter's neighbor. He said that when Carmen graduated, she got married and moved from her parent's house. He does not know where to. He was told that she moved to Villas de Loíza. He said that the elector does not sleep at her parents house, for he has not seen her husband's car there.

Ismael Santiago also testified against her. He knows the voter because he is her neighbor. She has not been living in Los Maestros for the last three years. She moved to Villas de Loíza. He knows that because he has visited her there several times. Once he went because Carmen's mother sent him along with her brother to take her some food. That was two years ago. He went there for the second time two weeks ago to pick up a basketball. He saw Carmen there.

The elector was summoned for hearing, but did not appear to defend her vote. It appears from N.P.P.'s exh. 49 that the summons was served by Irma Inglés Lucret upon Carmen Elías Medina on December 21, 1980, at Calle 19-Q-42, Loíza.

The evidence in this case shows that the elector got married, moved from her parents' residence in Río Grande, and established her habitual residence in Villas de Loíza three years ago. The evidence clearly, strongly, and convincingly establishes that the elector does not have her domicile within District No. 35. The Board's decision annulling her vote shall be affirmed.

(17) *Ivis Raquel Castaño Monet* (JR-80-279)

This elector voted in the precinct of Vieques for the Popular Democratic Party and its candidate Cepeda. She was challenged because she was not domiciled there. She denied the challenge under oath.

Abraham Galloway, Miguel Angel Bonano, and Manuela Santiago testified to support the challenge.

Abraham Galloway stated that he studies at the Interamerican University, Hato Rey Campus, but resides in Vieques. He was N.P.P. polling officer on election day. He challenged the vote of this elector. He has known her since she attended kindergarten. Ivis is 20 years old. She has not been residing in Vieques for the last year and a half. At present she lives in the metropolitan area.

During the cross-examination he mentioned that she invited him to her house in the metropolitan area and that her wedding was held on the Island. He has not seen her in Vieques since 1978. The last time he saw her in San Juan was in October 1979.

During the cross-examination, he admitted that he had seen her in May in Vieques visiting her grandmother. Afterwards, however, he answered that he did not see her at her grandmother's, but at Vieques' town square with her husband. He said that he also saw them in January, again at the town square. Ivis' parents live in Vieques but he does not know where. The witness has not seen Ivis' house in San Juan. She is the daughter of Vieques' mayor elect and she voted under the open polling place system.

Miguel Bonano also testified that he resides in Vieques and that he knows Ivis Raquel Castaño because she is her first cousin on his mother's side. He did not see her during 1980. She used to live in Vieques, at her grandmother's house in Muñoz Rivera Street accross from the Banco Popular. He has not seen her there for the last year and a half. He does not know her whereabouts and does not know where she lives.

Manuela Santiago, N.P.P. chairwoman, testified that she knows Ivis personally; that when she graduated from high school in 1978 she moved to Puerto Rico, she does not know why. She has not seen her since. A year ago Ivis' father told her that his daughter was getting married in San Juan. On cross-examination she mentioned that Ivis' grandpar-

ents went to live with her in the metropolitan area. She knows that because she lives in the neighborhood.

The elector was not summoned and she did not appear to defend her vote. The record includes a negative service of the summons, subscribed by Luis F. Rodríguez Amador before notary public Rafael Rosario Hernández, where it is stated: "I declare that I found the electoral residence of Ivis Raquel Castaño Monet in Vieques, P.R. That her uncle Mr. Miguelo Castaño Ortiz told me that Raquel Castaño lives in P. R. since approximately eight months ago."

The Popular Democratic Party challenges the sufficiency of the summons. We agree.

A negative service is not sufficient to deprive a person of her right to a hearing and to be heard, when the annulment of a fundamental right is involved. If the person could not be found at the address where he was supposed to be, steps should be taken to find where can he be summoned, and it must be shown to the satisfaction of the court that efforts have been made to find said person. If the person cannot be found, the possibility of service by publication cannot be eliminated. Compare this case with that of Maritza Pérez Cortés, No. (3) *ante*, where the Electoral Review Board found that the elector had not been duly served, despite that there was evidence to show that the process server left it at her house in her presence although her father obstructed the due service of the same. In the case under our consideration, the evidence transcribed does not show that, apart from a negative service, any efforts were made to find and serve the summons on the elector. When the process server was told that the elector "lives in Puerto Rico," as it was stated in the summons, he did not specify what steps were taken to find the elector's address in Puerto Rico.

The minimal steps taken in this case do not comply with the due process of law. The lack of due notice deprived the elector of her opportunity to appear and defend her vote.

With regard to the merits, the evidence is insufficient to establish that the elector does not have a domicile in Vieques. None of the witnesses have had personal contact with the elector during the last year. Her alleged address at Reparto Metropolitano is nowhere to be found. The witnesses infer that she does not live in Vieques at present based on hearsay evidence and on the fact that they have not seen her. This vague and deficient evidence cannot justify the annulment of this vote.

Vieques is a community with a population ranging on the thousands. According to the figures furnished by the Commonwealth Election Commission, 4,950 persons voted there in the past election. The fact that a person has not been seen in Vieques for a long period of time may indicate that such a person has moved to some other place, but does not constitute evidence that he has lost his domicile there. Please remember that a domicile is not lost until a new one is acquired. This was not shown here through clear, strong, and convincing evidence.

The Review Board's decision in this case shall be reversed, and the elector's vote shall be adjudicated and counted according to her will, that is, in favor of her party and its candidate Cepeda.

(18) *Ruth Rodríguez Díaz* (JR-80-279)

The elector voted in the precinct of Luquillo for the Popular Democratic Party and its candidate Cepeda. She was challenged because she did not have her domicile there. It was alleged that she resided at 283 Broadway, Newburgh, New York. She denied the challenge. Her case is similar to that of Ivis Raquel Castaño Monet, No. 17, *ante*.

The only witness who supported the challenge was Víctor Manuel Vargas. He testified that he is her neighbor at Barrio Juan Martín. He has known her for 18 years. She used to live three doors away from him. He stated that she

moved from Puerto Rico 3 or 4 years ago, although she has kept her property in Luquillo which she visits every once in a while. He said that he knows she does not live there because he is her neighbor and, in addition to this, he once took her to the Airport during one of her visits to Puerto Rico. When he saw her in Puerto Rico, the witness asked her for her son, and she told him that he resided in the United States, and that he could get in touch with him at the following address: José Alvarez Rodríguez c/o Ruth Rodríguez Díaz, 283 Broadway, Newburgh, New York. The address has no zip code and is written in the witness' own handwriting.

The elector was not summoned and she did not appear to defend her vote. Service of the summons was made at her local address, Mailbox No. 116, Barrio Juan Martín, Luquillo, but not at her mainland address, despite the fact that Irma Inglés Lucret, process server, expressly mentioned said address in the negative service as if it were her present address (Exh. 32, N.P.P.). For the summons to be sufficient at law, an effort to notify the elector at the address appearing on the negative service should have been made. The failure to do so violated the due process of law which requires that a reasonable effort be made to serve a summons on an elector so that he may appear to defend his vote. See Part II of this opinion. An elector cannot be considered as summoned on the basis of a mere negative service.

With regard to the merits, the evidence brought to support the challenge establishes that the elector "keeps her property in Luquillo and visits it every once in a while." We have already said that the physical presence is not a determinant or *sine qua non* requirement for keeping a domicile. The elector denied the challenge. A testimony which does not constitute clear, strong and convincing evidence and which went unrebutted because the elector was not summoned, cannot serve as a basis to annul a vote.

The Review Board's decision annulling the elector's vote will be reversed and it shall be counted for candidate Cepeda and his party.

(19) *Carmen Pimentel* (JR-80-279)

Elector Carmen Pimentel voted in Vieques casting a straight ballot for the Popular Democratic Party. She was challenged on the allegation of not having a domicile there. She did not deny the challenge, and limited herself to write her name on the ballot.

Upon upholding the challenge, the Electoral Review Board acted correctly. The fact that the elector entered her name on the ballot cannot be interpreted as a denial of the grounds of the challenge. Under Part II B of this opinion, we stated that the elector cannot remain idle when challenged and that, if said challenge is not timely denied and the challenge adduces facts that, if shown not to be true, constitute a valid reason for annulling the vote, the latter shall not be counted and will be null. Art. 5.034, Electoral Law, 16 L.P.R.A. § 3234. The allegation of not having a domicile in Vieques adduced in the challenge is a valid motive for annulling the votes regarding local candidates in Vieques and in District No. 35. The Board's decision will be affirmed.

(20) *Migdalia Sánchez Hernández* (Exh. 56, N.P.P.)

(21) *Iris D. Sánchez Hernández* (Exh. 57, N.P.P.)

(22) *Fernando Pagán Rodríguez* (Exh. 93, N.P.P.)

(23) *Michael Ferris* (Exh. 62, N.P.P.)

(24) *Carmen D. López Ramos* (Exh. 67, N.P.P.)

(25) *Gloria López Ramos* (Exh. 68, N.P.P.)

(26) *Annie L. Pérez Ortiz* (Exh. 63, N.P.P.)

(27) *José González Fontánez* (Exh. 64, N.P.P.)

The eight cases enumerated above—Nos. (20) to (27)—correspond to case JR-80-279. These are electors who voted in different precincts within Representative District No. 35 for the Popular Democratic Party and its candidate for the House of Representatives, Cepeda. They are challenged by the New Progressive Party but in none of the cases the contestant signed the challenged thus failing to comply with the legal provision, art. 5.034 (16 L.P.R.A. § 3234) which requires that the challenge must be, "signed by the person or the polling place inspector who issues the challenge."

The Review Board overlooked this requirement and considered each challenge on the merits. It erred. We refer to Part II B of this opinion where we set down the standards applicable to this situation. The provisions of the Electoral Law on the procedure for annulling a vote of an elector through a challenge should be strictly complied with.

The Board's decisions in these eight cases will be reversed and the votes shall be adjudicated and counted for the Popular Democratic Party and its candidate Cepeda.

(28) *Carlos Olmedo* (JR-80-279)

This elector case a straight ticket for the Popular Democratic Party in the precinct of Río Grande. There are two issues at stake in this case: first, the contestant's name does not appear from the challenge; and second, the elector was challenged because he had a "double registration" and this notwithstanding the Board annulled his vote on another ground not adduced in the challenge, to wit, that the elector did not have a domicile at the place where he voted. Under these circumstances, the challenge cannot prevail.

With regard to the first aspect, the case is similar to that of the eight electors we discussed above. If the contestant does not identify himself, he does not assume responsibility

for the challenge. It should be borne in mind that the contestant may be a polling place supervisor or any other elector. "Any voter or inspector who has a good reason to believe . . .", is the first line of art. 5.034 (16 L.P.R.A. § 3234), while mentioning who may challenge an elector.

The second aspect is also settled on the basis of the standards we set forth in Part II B. When taking cognizance of a challenge, only the grounds adduced therein shall be taken into account. At the moment the challenge is made, the elector is notified of the grounds therefor and he will deny it if he deems that the grounds are false. If the challenge is annulled on grounds not adduced and which the elector had no opportunity to rebut, he is denied the equal protection of the law. The challenge must adduce all its grounds in order to give the elector the opportunity to deny them so that they may be examined.

The Review Board's decision in this case will be reversed and the elector's vote shall be counted for candidate Cepeda and his party.

(29) *Jesús A. Acosta Berríos* (JR-80-281)

This elector cast a straight ballot for the New Progressive Party in the precinct of Río Grande. He was challenged because he is a resident of Canóvanas. When he answered it the elector did not deny the challenge. He stated: "I accept that I have been residing in Canóvanas for approximately one year." The case is similar to that of Carmen Pimentel, No. (19), save for the fact that whereas that elector merely entered her name and did not deny the challenge, this elector signed and *accepted* the ground of the challenge. This was sufficient to annul his vote, pursuant to art. 5.034 (16 L.P.R.A. § 3234), which provides that if the elector did not deny the challenge, "his vote shall not be counted and shall be null and void." The Board erred in adjudicating the vote.

The Board's decision will be reversed and this elector's vote shall be substracted from the votes cast for New Progressive Party candidate Molina.

(30) *Angel Tibot Solís* (JR-80-281)

This elector voted in the precinct of Luquillo and was challenged by the Popular Democratic Party by reason of domicile. The elector denied the challenge. The Board upheld the validity of the vote in Luquillo.

The evidence brought in support of the challenge consisted in the testimonies of Livia F. Silva and Luis M. Vázquez Díaz. The Board's resolution ignored the testimony of the former. She testified that she is a school teacher and that she resides at 8-L-10, Brisas del Mar, Luquillo. She knows the elector and he resides at Belleview, Villa Palmeras, Santurce, and he was residing there on election day. She is Popular Democratic Party Local Commissioner and helped her daughter visit the electors' houses and could corroborate that the elector does not reside in Luquillo. The house where he alleged to live was occupied by a sister of his, her husband, and a nephew. She is sure that he does not reside there because she has been a teacher since 1954, she taught all of the children of Tibot's sister, and all the grandchildren, and has visited the house many times, which she described in detail. She learned that the elector resided in Santurce because she had to serve him with the summons and his nephew told her his address. She did not find him when she went to make the service, but she left the summons with a neighbor who told her that Tibot lived there.

On cross-examination, the witness Livia F. Silva admitted that she learned who Tibot was "by sight, and just a week ago." (Tr. Ev., p. 2758.) She said that she does not remember people by their names but by the face, and that she had never seen him at his sister's house in Luquillo, which place she visits quite often.

Witness Luis M. Vázquez stated that he lives at 154 Fernández García street, Luquillo, one block away from 154 Del Carmen street, where the challenged voter alleges to live. He knows that Tibot does not live there because he knows his family who lives there. He said that when he challenged Tibot on election day. The latter answered "it's all right," but Mr. Cecilio Rivera Ponce told him "no, go ahead and vote," "and then he voted and when he went out Cecilio Rivera denied the challenge for him and he signed it." (Tr. Ev., p. 3140.)

On cross-examination, the witness admitted that he had not seen the elector before election day, that Tibot's sister Paula lives at No. 54 street, and that he can assert that Tibot has not lived nor could have lived there since 1976. But he cannot tell whether Tibot has lived elsewhere in Luquillo.

These testimonies alone could have supported the validity of the challenge and annulled the elector's vote under the preponderance of the evidence standard applied by the Commission to other cases, if this standard would have been uniformly applied. Taken together with the testimony of the elector, who appeared and offered testimony, the entire evidence shows up in a clear, strong and convincing manner that the elector's domicile has been in Santurce since 1976. Let us see.

The elector said that he does not have a permanent job, that he paints, goes to the park along Condado, to "*encargar.*" (Tr. Ev., p. 3308.) He does that frequently. If he gets some money he goes to his sister's house at 54 Del Carmen Street, Luquillo, and spends the weekend there. He has clothes and a bed there. He has been residing there since the last elections. (Tr. Ev., p. 3309.) He thinks that he resides in Luquillo. (Tr. Ev., p. 3312.) He has a room in Santurce, 388 Belleview Street. He has all the necessary things there. He does not have a job in Luquillo. Two months after the 1976 elections (Tr. Ev., p. 3315), he got a small painting

job and could pay his room at Belleview Street in advance. He said that he was always doing something, "because he wanted to move out of Luquillo." *He wanted to move because, "if a girl showed up, well, he could not bring her to his sister's." He admitted that he wanted to have a residence separate from that of his sister because if he got a woman, he could live with her and support her.* (Tr. Ev., p. 3316.) *This has been his intention since he got that room.* (Tr. Ev., p. 3118.) *He wants to stay and live in San Juan and make up a family with whoever comes along.* (Tr. Ev., p. 3118.)

Is the elector domiciled in Luquillo? If we apply the customary residence standard, which was applied by the Board to other cases, we would have to say no. Appart from the testimonies brought in support of the challenge, the elector himself admitted that he has been residing in Santurce since two months after the 1976 elections, and that he goes to "his sister's house" in Luquillo if he gets some money, and spends the weekend there. Hence, Luquillo is not where he habitually resides "when he is not called elsewhere to work, or for some other temporary purpose, and to which such person returns during his rest periods." Art. 2.004 (16 L.P.R.A. § 3054(c)). This elector does not have a permanent job in San Juan and we cannot say that he returns to Luquillo during his rest periods. His customary residence is in San Juan, as is also his *animus manendi*. According to his own testimony, his intention has been to remain in San Juan and to make up a family there. There is no serious argument that his domicile is not there. Compare with cases Nos. (1), (2), (3), and (4), Part III.

The Review Board's decision in this case will be reversed, at the elector's vote shall be substracted from the votes for candidate Molina.

(31) *Jesús Alverio Figueroa* (JR-80-281)

This elector cast a straight ticket for the New Progressive Party in precinct No. 102 in Ceiba. He was challenged

for not having a domicile in that precinct. The evidence to support the challenge consisted of the testimony of three witnesses: Víctor M. Meléndez Santiago (Tr. Ev., p. 2635), Wilfredo Maldonado Montes (Tr. Ev., p. 2665), and Rosa Iris Ayala (Tr. Ev., p. 2704).

Víctor M. Meléndez stated that he has resided on Parcela de Aguas Claras, Ceiba, for the last 23 years. He has known Jesús Alverio Figueroa during all that time. He lives behind his father's house, where he has a ten by ten unpainted panel house with a zinc rooftop. In 1977 he moved to Barrio Macho, Polo Norte, but he returned to Aguas Claras late that year. He has stayed there since then. The witness' house is four or five doors away from the elector's. The Aguas Claras sector where they live is part of precinct No. 96. The challenge voter does odd jobs in masonry. On cross-examination he admitted that he has not visited Jesús house in six months.

Wilfreda Maldonado Montes stated that he is a process server and that he has known the elector all his life. He lives at Severiano Fuentes Frías Street in Ceiba. The challenged voter lives in Parcelas de Aguas Claras, Ceiba. He has been living there for more than two years. Before that he used to live in Villa Palmeras, Polo Norte, at the house of Doña Chefa, Tavárez widow. He thinks that Polo Norte belongs to Barrio Machos. Doña Chefa's husband was a relative of the witness. Jesús Alverio Figueroa lived with them for about three years, in an apartment he had there. He knows that the elector lives now in Aguas Claras because he has taken him there in his car. The house of Jesús' father is made of cement and has no other structure. He does not know where Jesús' goes after he leaves him there.

Rosa Iris Ayala, whose testimony is not mentioned in the resolution of the Board, stated that she served the summons on the elector. At first she went to the address appearing on the electoral list, but did not find him there. She then went to Parcelas de Aguas Claras, house No. 330, Ceiba, and served the summons there.

The elector appeared to defend his vote. In the examination he was asked his address and he answered: "Parcelas de Aguas Claras." (Tr. Ev., p. 6130.) He has a sister named Fafi, who lives in Polo Norte. When asked where his home was, he said: "Well, I go to Fafi's house, I sleep there, but I either sleep there or at Parcelas de Aguas Claras, do you follow me, because I have a house there." When asked on how often did he sleep at Fafi's, he answered, "two or three nights, almost every night."

When examined by Atty. Andreu García, he answered as follows:

Q. Don Jesús, the truth is that you have a house at your father's place.

A. Exactly.

Q. And it is yours.

A. It is mine.

Q. Your house. . . .

A. My house

Q. *Where you feel at home.*

A. *At home.*

Further on, he was asked:

"And the truth is that you spend more time at your father's, and there, at a coffee shop where you can have a couple of drinks, right there on the corner of the entrance to the parcelas, right?"

A. "Yes, I spend my time sitting there, they don't sell liquor there, but accross the street they do."

Based on the preponderance of evidence standard, we can conclude that this elector is domiciled in Aguas Claras. Moreover, the evidence to establish this, and even the elector's own admissions, are strong. However, they leave a

doubt, specially if we consider the particular situation of precinct No. 102. The Municipality of Ceiba comprises two precincts, Nos. 96 and 102. Precinct No. 96 includes *barrios* Daguao, Chupacallos, Quebrada Seca, and Guayacán. Downtown Ceiba, and the *barrios* Machos, Río Abajo, and Sacos are comprised within precinct No. 102. Art. 5.008 of the Electoral Law, 16 L.P.R.A. § 3208. The territorial areas of our municipalities are relatively small. Therefore, it is difficult to imagine that the interests of the persons who have their domicile in one particular municipality are not spread among the different *barrios*. Such is the case of this elector, who just the same lives either in *barrio* Machos (precinct No. 102), or in Aguas Claras (precinct No. 96), and who sleeps either at his sister's in Machos, or at a house he has in Aguas Claras. The elector is registered in precinct 102 and he voted there. This makes us presume, at least, that he has his domicile there. The evidence is not strong or convincing enough to destroy that presumption.

The decision of the Review Board will be upheld and the elector's vote will be counted for candidate Molina.

(32) *Daniel Marte Alturez* (JR-80281)

This elector voted in precinct No. 102 of Ceiba for the New Progressive Party. His vote was challenged for domicile reasons. The Board upheld the validity of the vote when it concluded that the elector was domiciled in that precinct.

This case is identical to those of the eight electors we have enumerated from (20) to (27). In this case, as in the others, the contestant did not sign the challenge. Hence, it was not valid and did not have to be seen on its merits.

The Board's decision in this case will be affirmed, and the vote will be adjudicated to candidate Molina and his party.

(33) *Raquel Rincón Uriquen* (JR-80-281)

This elector voted in the precinct of Río Grande and was challenged by the Popular Democratic Party by reason of domicile. She denied the challenge. Nilda Cordero García and Sara Rodríguez Díaz gave testimony in support of the challenge.

Nilda Cordero García stated that she has known Raquel Rincón Uriquen for many years because they went to school together. After they graduated they kept seeing each other during weekends at the farm owned by the elector's parents, located at El Verde, Río Grande. While she was studying at the university the elector moved to an apartment on the second floor of Fotografía Castro, De Diego Street, Río Piedras, where she worked. She moved in 1969. The elector got married in 1979, established her residence at Condominios Bello Horizonte, Viejo Comandante, Carolina. She lived in the Tenth Floor, Apt. 11. Her husband died five months ago. She went to the funeral in Río Piedras.

On cross-examination she said that Raquel's parents live in El Verde, and she knows that she has not returned to live with them because she herself told the witness. (Tr. Ev., p. 3179) She has not seen Raquel since October 1980.

Sara Rodríguez Díaz stated that she lives in El Verde, Río Grande; that on election day she was Popular Democratic Party polling place officer at *Barrio* El Verde, precinct No. 97, Río Grande. She knows the elector well because her family is from El Verde. Raquel's parents live about two kilometers away from the witness. Every time she goes to work at Palmer, she must go by the house of Raquel's parents. She saw the elector on election day when she went to vote at a closed polling place. (Tr. Ev., p. 3189) She did not have her electoral identification card. She challenged her vote because she has not been residing in El Verde for the last three to five years. She knows

that Raquel does not live there because she lives in that area and has not seen her for many years and because several neighbors have told her that Raquel moved.

The elector appeared. She stated that she resides at Condominio Bello Horizonte since October 1980. She said she has never been mrried. Before October, she used to live in El Verde at her parents' house. She admitted that she knows Nilda Cordero García. She denied Nilda Cordero García's statements before the Board. (Tr. Ev., p. 3522.) She said she did not know Sara Rodríguez Díaz.

On cross-examination the elector was confronted with documentary evidence appearing in the original record as exhibits 38, 39, and 40 of the N.P.P., and which we have examined. Exhibit 40 is an official document of the Department of the Treasury entitled "Petition for Tax Exemption and Certificate of Property Ownership and Use," subscribed by the elector *under oath* on August 8, 1980. Therein, she stated that she resided on Apt. 1011, Condominio Bello Horizonte, Río Piedras, by January 1, 1980. This corroborates Nilda Cordero García's statement to the effect that the elector established her residence there in 1979, and contradicts her own testimony given before the Board to the effect that she has been residing in that condominium "since October 1980." When she was confronted with this evidence, the elector admitted (Tr. Ev., p. 353) that she was a resident of Carolina. And referring to the same documentary evidence (Exh. 40), where she stated under oath that her former residence was Villa Fontana, 3J #6, Carolina, she had to admit that this was true and that she herself furnished all the information appearing on that exhibit.

Exhibit No. 38 is a public deed executed by the elector on August 8, 1980, whereby she mortgaged the above-mentioned apartment at Condominio Bello Horizonte to secure a note subscribed by her, authenticated before a notary on that same date. (N.P.P. exhibit No. 39). In both

documents the elector stated that she was a resident of Carolina, and she thus recognized it when confronted with them, and she said that all the information appearing thereon was true.

Lastly, the elector stated that she had a "boyfriend" named Bienvenido Mojica, who died on September 1980 (Tr. Ev., p. 3543), and that they were together for five years.

Despite the fact that, on cross-examination and when confronted with the above-mentioned documentary evidence, the elector expressly admitted that by January 1, 1980 she lived in Bello Horizonte and that before that she lived in Villa Fontana, Carolina, the Review Board concluded that she resided and had her domicile in El Verde, Río Grande. That is to say, the Board gave credit to a testimony rectified by the very elector and that, therefore, had lost any judicial validity and effectiveness.

Taken as a whole, the evidence doubtlessly establishes in a clear, strong, and convincing manner that the elector was not domiciled in Río Grande nor in District No. 35, and that, therefore, her vote could not be counted in favor of any candidate for the House of Representatives for said representative district. The Board's decision in this case will be reversed and this elector's vote shall be substracted from New Progressive Party candidate Molina.

(34) *José A. Acosta Anglada* (JR-80-278)

(35) *Héctor Ramírez Aponte* (JR-80-280)

(36) *Rafael T. Rodríguez Rodríguez* (JR-80-284)

(37) *María Luz Morales Meléndez* (JR-80-283)

The cases of these four electors were discussed under Part II C of this opinion. These are persons who have their domicile in precincts of Representative District No. 35, who voted for the Popular Democratic Party and its

candidate Cepeda, and whose votes were annulled because the transfer petitions they had timely made in order to appear on the electoral lists, of the respective precincts where they voted, were not perfected. In view of the grounds we stated on said Part II C, we reverse the Electoral Review Board's decision which upheld the validity of the challenge in each case, and these votes will be adjudicated to candidate Cepeda.

(38) *Víctor Meléndez Alvira* (JR-80-282)

(39) *Manuela Meléndez Alvira* (JR-80-282)

Electors Víctor and Manuela Meléndez Alvira voted in the precinct of Fajardo for the New Progressive Party and its candidate Molina. They were challenged because they did not have their domicile in said precinct.

The Commonwealth Election Commission adjudicated the votes because the challenges were not perfected until the ballot box was opened and the electors were already gone. The decision was affirmd by the Review Board. We agree.

The unrebutted facts were as follows. The electors are poor people, about 60 years old. He had little or no education, and she is blind. They went to the polling place accompanied by another person. When they were about to vote, the Popular Democratic Party polling place officer challenged them by reason of domicile. He wrote the corresponding grounds and signed his name at the bottom of the ballot. But he failed to identify the voters by their names and electoral identification numbers. The voters did not deny the challenges. The ballots were deposited in the ballot box. These two were the only ballots challenged in said polling place, and, when the voting was over and the ballot box was opened, the officers agreed to put the name of the two electors on the ballots.

There is no doubt that the ballots where the elector's names were written were theirs. But the procedure for challenging an elector provided by the above-cited art. 5.034 of the Law, 16 L.P.R.A. § 3234, was not followed. In Part II B of this opinion we said that the statutory provision must be strictly complied with. In addition to this, since the electors were not present at the moment when their challenges were perfected, they were deprived of the opportunity to deny them at that moment. The Board's decision will be affirmed and the votes will be adjudicated to candidate Molina.

(40) *The case of the ballot bearing multiple marks* (JR-80-276).

We are dealing here with a ballot (see Annex "E") which bears a cross (X) and the letter "F" under the Popular Democratic Party emblem, and a slash mark (/) under that of the Puerto Rican Independence Party. In view of the grounds we laid down in Part II E of this opinion, where we examined this case, the Electoral Review Board's decision which substracted said vote from Popular Democratic Party candidate Cepeda will be affirmed.

CONCLUSION

As per amendments of January 16 and 21, 1981, the final decision of the Electoral Review Board reflected the following results for the two candidates for House Representative for Representative District No. 35: Mr. Osvaldo Molina, New Progressive Party candidate, 22,918 votes; Mr. Samuel Cepeda, Popular Democratic Party candidate, 22,895 votes. The difference determined was of twenty-three votes.

According to the analysis we have made in Part III of this opinion of each of the forty cases brought before our consideration, the following rectifications shall be made to the final decision of the Electoral Review Board: the votes

of electors Roberto Pérez (1), Nellie Cortés (2), Maritza Pérez Cortés (3), Jesús A. Acosta Berríos (29), Angel Tibot Solís (30), and Raquel Rivera Uriquen (33), whose ballots were validly challenged, shall be substracted from candidate Osvaldo Molina; the votes of electors María Soto Sanes (5), Norma Soto Sanes (6), José Luis Castaño (7), Awilda Moringlane Encarnación (8), Juan H. Carrillo (9), Sonia Becerril (10), Wanda Cotto Cantres (11), Lydia Cardona Lebrón (12), Nancy Maldonado Cruz (13), Jesusa Vizcarrondo Díaz (14), Lucía Avila (15), Ivis Raquel Castaño Monet (17), Ruth Rodríguez Díaz (18), Migdalia Sánchez Hernández (20), Iris D. Sánchez Hernández (21), Fernando Pagán Rodríguez (22), Michael Ferris (23), Carmen D. López Ramos (24), Gloria López Ramos (25), Annie L. Pérez Ortiz (26), José González Fontánez (27), Carlos Olmedo (28), José A. Acosta (34), Héctor Ramírez Aponte (35), Rafael T. Rodríguez Rodríguez (36), and María Luz Morales Méndez (37)[36] whose challenges are not valid, will be adjudicated to candidate Samuel Cepeda. Consequently, the final figures of Representative District No. 35 shall be amended as follows: New Progressive Party candidate Osvaldo Molina, 22,912 votes; Popular Democratic Party candidate Samuel Cepeda, 22,921 votes.

The appellant alleges before us that the Electoral Review Board acted in a biased manner. We need not pass on this nor shall we do it. The resolution of the Board is based on restrictive standards on the exercise of suffrage which, as we have already pointed out, are not adequate. We have also seen that, in some cases, these standards were not uniformly applied. However, we recognize that the Board had to work under pressure, at a time of great tension, under an irregular and burdensome work schedule, in order to turn out, at the earliest possible date, a decision on the final result of Representative District No. 35.

---

[36] The numbers in parentheses appearing next to the name correspond to the numbers appearing before the name of each elector in Part III of this opinion.

The electorates' extreme polarization between the two main political parties, and the narrow margin between the two have stirred up the spirits and given place to statements and verbal attacks against the agencies having the responsibility of passing on controversies at a level of the most high and stringent judiciality. These attacks in no way help to keep the peace and quiet among our people perturbed by the electoral struggle it has just undergone. We should hope that the leaders of these good people know how to discharge their historical responsibility of not weakening, incited by the spur of the moment, the institutions created by the Constitution and the Laws to act as arbitrators in a democratic system. Insofar as those institutions are concerned, our effort will be to discharge our responsibilities according to the most exacting impartiality. And may God help us.

Judgment will be rendered reversing the decision of the Electoral Review Board, and declaring Mr. Samuel Cepeda of the Popular Democratic Party, House Representative elect for Representative District No. 35, to whom a total of 22,921 votes will be adjudicated, against 22,912 obtained by Mr. Osvaldo Molina, New Progressive Party candidate.

ESTADO LIBRE ASOCIADO DE PUERTO RICO
COMISION ESTATAL DE ELECCIONES

T-180304

SOLICITUD DE TRANSFERENCIA

USE LETRA DE MOLDE — USE LETRA DE MOLDE

DECLARO QUE ESTOS SON LOS DATOS CORRECTOS Y VERDADEROS CON LOS CUALES APAREZCO INSCRITO

PRECINTO DE INSCRIPCION | DISTRITO | NUMERO PETICION | UNIDAD ELECTORAL | NUMERO DE IDENTIFICACION

APELLIDO PATERNO | APELLIDO MATERNO

NOMBRE | NACI EN EL MUNICIPIO DE

NOMBRE DEL PADRE | NOMBRE DE LA MADRE

DIRECCION RESIDENCIAL, NOMBRE O NUMERO DE LA CALLE
PERMANENTE, NUMERO DEL BLOQUE Y DE LA CASA

ESTATURA | COLOR DE OJOS: 1 AZUL, 2 GRIS, 3 MARRON, 4 NEGRO, 5 VERDE

SECTOR, BARRIO O URBANIZACION

NACIO: DIA | MES | AÑO | SEXO: F, M

DE LA MISMA MANERA DECLARO QUE HE CAMBIADO MI DOMICILIO Y QUE MI NUEVA DIRECCION ES LA DE LOS DATOS ARRIBA EXPRESADOS QUE SON CORRECTOS Y VERDADEROS

PRECINTO | DISTRITO | UNIDAD ELECTORAL | ESCUELA O EDIFICIO PUBLICO MAS CERCANO

DIRECCION RESIDENCIAL, NOMBRE O NUMERO DE LA CALLE
PERMANENTE, NUMERO DEL BLOQUE Y DE LA CASA

DIRECCION POSTAL: CALLE Y NUMERO, APARTAMENTO O APARTADO POSTAL

SECTOR, BARRIO O URBANIZACION

SECTOR, BARRIO O URBANIZACION

SI ES ZONA RURAL, CAMINO VECINAL MAS CERCANO
KILOMETRO Y HECTOMETRO DE LA CARRETERA

MUNICIPIO | ZONA POSTAL

DECLARO BAJO JURAMENTO QUE TODOS LOS DATOS DE ESTA SOLICITUD SON LA VERDAD SEGUN HAN SIDO SUMINISTRADOS POR MI.

CERTIFICAMOS (O CERTIFICO) QUE EL SOLICITANTE ARRIBA DESCRITO FIRMO O MARCO SU SOLICITUD DE TRANSFERENCIA EN PRESENCIA NUESTRA Y SE LE DESGLOSADA UNA COPIA DE LA MISMA DESPUES DE DICHA SOLICITUD HABER SIDO FIRMADA POR NOSOTROS (O POR MI).

FIRMA O MARCA DEL PETICIONARIO

RAZON POR LA CUAL NO FIRMO

EN _____ P.R. A ____ DE _____ DE _____
MUNICIPIO — DIA — MES — AÑO

FIRMA DEL FUNCIONARIO PSP — SOMBRE EN LETRA DE MOLDE

FIRMA DEL FUNCIONARIO PPD — SOMBRE EN LETRA DE MOLDE

FIRMA DEL FUNCIONARIO PIP — SOMBRE EN LETRA DE MOLDE

QUINTA COPIA – ELECTOR

ANEJO "A"

CODIFICACION DE MUNICIPIOS

NUM DEL MUNICIPIO	NOMBRE DEL MUNICIPIO
1	Adjuntas
1	Adjuntas
2	Aguada
3	Aguadilla
4	Aguas Buenas
5	Aibonito
5	Aibonito
6	Añasco
7	Arecibo
7	Arecibo
8	Arroyo
9	Barceloneta
10	Barranquitas
11	Bayamon
11	Bayamón
11	Bayamon
11	Bayamon (Hato Tejas)
12	Cabo Rojo
13	Caguas
13	Caguas
14	Camuy
15	Canovanas
16	Carolina
16	Carolina
16	Carolina
17	Cataño
18	Caves
19	Ceiba
19	Ceiba
20	Ciales
21	Cidra
21	Cidra
22	Coamo
23	Comerio
24	Corozal
25	Culebra
26	Dorado
26	Dorado
27	Fajardo
28	Florida
29	Guanica
30	Guayama
30	Guayama
31	Guayanilla
31	Guayanilla
32	Guaynabo
32	Guaynabo
33	Gurabo
34	Hatillo
34	Hatillo
35	Hormigueros
36	Humacao
37	Isabela
38	Jayuya
39	Juana Diaz

NUM DEL MUNICIPIO	NOMBRE DEL MUNICIPIO
40	Juncos
41	Lajas
42	Lares
43	Las Marias
44	Las Piedras
44	Las Piedras
45	Loiza
46	Luquillo
47	Manati
47	Manati
48	Maricao
49	Maunabo
50	Mayaguez
50	Mayaguez
50	Mayaguez
51	Moca
51	Moca
52	Morovis
53	Naguabo
54	Naranjito
55	Orocovis
56	Patillas
57	Penuelas
58	Ponce
58	Ponce
58	Ponce
59	Quebradillas
60	Rincon
61	Rio Grande
62	Sabana Grande
63	Salinas
64	San Germar
64	San German
65	San Juan
65	San Juan
65	San Juan
65	San Juan
65	San Juan
65	San Juan
65	San Juan
66	San Lorenzo
67	San Sebastian
68	Santa Isabel
68	Santa Isabel
69	Toa Alta
70	Toa Baja
70	Toa Baja
71	Trujillo Alto
71	Trujillo Alto
72	Utuado
73	Vega Alta
74	Vega Baja
75	Vieques
76	Villalba
77	Yabucoa
78	Yauco

ANEJO "B"

ESTADO LIBRE AND SOBERANO DE PUEBLA
COMISION ESTATAL DE ELECCIONES

SOLICITUD DE TRANSFERENCIA

ORIGINAL -COMISION ESTATAL DE ELECCIONES

ESTADO LIBRE AND SOBERANO DE PUEBLA
COMISION ESTATAL DE ELECCIONES

PETICION DE INSCRIPCION COMO ELECTOR

ORIGINAL -COMISION ESTATAL DE ELECCIONES

ANEJO "C"

Enmend 25-1A

ESTADO LIBRE ASOCIADO DE PUERTO RICO
COMISION ESTATAL DE ELECCIONES

T-180506

SOLICITUD DE TRANSFERENCIA

USE LETRA DE MOLDE — USE LETRA DE MOLDE

DECLARO QUE ESTOS SON LOS DATOS CORRECTOS Y VERDADEROS CON LOS CUALES APAREZCO INSCRITO

PRECINTO DE INSCRIPCION	DISTRITO	NUMERO PETICION	UNIDAD ELECTORAL	NUMERO DE IDENTIFICACION

APELLIDO PATERNO: [illegible]

APELLIDO MATERNO: [illegible]

NOMBRE: [illegible]

NACIO EN EL MUNICIPIO DE: [illegible]

NOMBRE DEL PADRE: [illegible]

NOMBRE DE LA MADRE: [illegible]

DIRECCION RESIDENCIAL, NOMBRE O NUMERO DE LA CALLE PERMANENTE, NUMERO DEL BLOQUE Y DE LA CASA: [illegible]

ESTATURA: 05

COLOR DE OJOS: 3 (1. AZUL 2. GRIS 3. MARRON 4. NEGRO 5. VERDE)

SECTOR, BARRIO O URBANIZACION: [illegible]

NACIO: DIA 10 MES 03 ANO 42 SEXO F

DE LA MISMA MANERA DECLARO QUE HE CAMBIADO MI DOMICILIO Y QUE MI NUEVA DIRECCION ES LA DE LOS DATOS ABAJO ESPECIFICADOS QUE SON CORRECTOS Y VERDADEROS

PRECINTO	DISTRITO	UNIDAD ELECTORAL	ESCUELA O EDIFICIO PUBLICO MAS CERCANO
097 Rio Grande	061	02	Paluo [illegible]

DIRECCION RESIDENCIAL, NOMBRE O NUMERO DE LA CALLE PERMANENTE, NUMERO DEL BLOQUE Y DE LA CASA: Calle 42 A4-72

DIRECCION POSTAL, CALLE Y NUMERO, APARTAMENTO O APARTADO POSTAL: Calle 42 A4-72

SECTOR, BARRIO O URBANIZACION: Jardines Rio Grande

SECTOR, BARRIO O URBANIZACION: Jardines Rio Grande

SI ES ZONA RURAL, CAMINO VECINAL MAS CERCANO, KILOMETRO Y HECTOMETRO DE LA CARRETERA:

MUNICIPIO: Rio Grande — ZONA POSTAL: 00745

CERTIFICAMOS (O CERTIFICO) QUE EL SOLICITANTE ARRIBA DESCRITO FIRMO O MARCO SU SOLICITUD DE TRANSFERENCIA EN PRESENCIA NUESTRA Y SE LE DEVOLVIO UNA COPIA DE LA MISMA DESPUES DE DICHA SOLICITUD HABER SIDO FIRMADA POR NOSOTROS (O POR MI)

DECLARO BAJO JURAMENTO QUE TODOS LOS DATOS DE ESTA SOLICITUD SON LA VERDAD SEGUN HAN SIDO SUMINISTRADOS POR MI

[illegible]
FIRMA O MARCA DEL PETICIONARIO

[illegible]
FIRMA DEL FUNCIONARIO PNP — NOMBRE EN LETRA DE MOLDE

Rosa Ivette Ayala
FIRMA DEL FUNCIONARIO PPD — NOMBRE EN LETRA DE MOLDE

RAZON POR LA CUAL NO FIRMO

EN Rio Grande P.R. A 6 DE 7 DE 80
MUNICIPIO — DIA — MES — ANO

[illegible] (SANTOS MATOS)
FIRMA DEL FUNCIONARIO PIP — NOMBRE EN LETRA DE MOLDE

ORIGINAL —COMISION ESTATAL DE ELECCIONES

ANEJO "D"

COMISION ESTATAL DE ELECCIONES

ELECCIONES GENERALES

PAPELETA ELECTORAL

4 DE NOVIEMBRE DE 1980

Municipio de LUQUILLO

Distrito Senatorial Núm. 7

Precinto Núm. 98

Distrito Representativo Núm. 36

PARTIDO NUEVO PROGRESISTA	PARTIDO POPULAR DEMOCRATICO	PARTIDO INDEPENDENTISTA PUERTORRIQUEÑO	PARTIDO SOCIALISTA PUERTORRIQUEÑO	NOMINACION DIRECTA (WRITE IN)
Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico	Gobernador de Puerto Rico
1 Carlos Romero Barceló	1 Rafael Hernández Colón	1 Rubén Berríos Martínez	1 Luis Lausell Hernández	1
Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos	Comisionado Residente en los Estados Unidos
2 Baltasar Corrada del Río	2 José Arsenio Torres	2 Marta Font de Calero	2	2
Senadores por el Distrito	Senadores por el Distrito	Senadores por el Distrito	Senadores por el Distrito	Senadores por el Distrito
3 Francisco Estrada Bihilrmi	3 Jesús Santa Aponte	3 Jorge Francechi Cundra	3 José Fontánez Escobar	3
4 Tato Hernández	4 Gilberto Rivera Ortiz	4 Víctor A. Torres Ortiz	4 Américo Angleró Rivera	4
Representante por el Distrito	Representante por el Distrito	Representante por el Distrito	Representante por el Distrito	Representante por el Distrito
5 Osvaldo Molina Vazquez	5 Samuel Cepeda García	5 Vidal Vazquez Montes	5 Rubén Berberena Reyes	5

ESTABILIDAD SEGURIDAD PROGRESO

PAN-TIERRA-LIBERTAD

F X

¡La Oposición Verdadera!

NOMINACION DIRECTA (WRITE IN)

Se provee esta columna en blanco para que el elector anote en ella el nombre de cualquier otro candidato que desee escoger, fuera de los que aparecen en las columnas anteriores.

Artículo 5.011 Ley Electoral

C I T A C I O N Exhibit 103 P.P.D. JR80-284 1-9-81

Partido Popular Democrático Y Samuel Cepeda VS. Partido Nuevo Progresista, Gerineldo Barreto y Osvaldo Molina

CASO NUM. JR.80-274 al JR.80-284

SOBRE: Apelación De Adjudicación De Papeletas

Por orden de la Junta Revisora Electoral de Puerto Rico, y en virtud de los poderes que le confiere a ésta, la Ley Número 4 del 20 de diciembre de 1977, según enmendada, se requiere de usted Nilsa Lugo Rivera, que comparezca a vista pública en la Junta Revisora Electoral, Calle San Agustín 114, Puerta de Tierra, San Juan, el día 8 de enero de 1981 a las 10:00 a.m., en calidad de elector recusado en relación con el caso de epígrafe.

Se le apercibe, además, que de no comparecer en el día y hora antes señalados, la Junta Revisora Electoral podrá tomar la acción que proceda.

En San Juan, Puerto Rico, a 26 de diciembre de 1980.

Lourdes T. Quiñones
Lourdes T. de Quiñones
Secretaria

JUNTA REVISORA ELECTORAL DE PUERTO RICO

ANEJO "E"

DILIGENCIAMIENTO POR PERSONA PARTICULAR

Yo, Juan Bautista Arroyo previamente juramentado, DECLARO: Que me llamo como queda dicho; soy mayor de 21 años de edad; sé leer y escribir; y no soy abogado del querellante en este caso, ni parte en este pleito, no teniendo tampoco interés en el mismo.

Que recibí esta notificación el día 7 de Enero de 1982, notificándolo personalmente a Ignacio Díaz, o sea, el querellado mencionado en dicha notificación, el día 7 de Enero de 1982, a las 7:28 de la P.M. en 3X Hato Rey Ave. Los Angeles, 4th East Carolina, Puerto Rico, entregándole personalmente copia de la Querella presentada y copia de esta Notificación al dorso del cual hice constar, bajo mi firma, la fecha y sitio de su entrega y notificación.

Juan Bautista Arroyo
Diligenciante

Cfi 369

Jurado y suscrito ante mí por Juan Bautista Arroyo quien es mayor de 18 años de edad, mayor de edad soltero, empleado, y vecino de Puerto Rico, Puerto Rico, hoy día 8 de Enero de 1982.

JOSE A. NAZARIO ALVAREZ
PUERTO RICO
ABOGADO-NOTARIO

ANEJO "F-1"

MR. JUSTICE NEGRON GARCIA, concurring.

San Juan, Puerto Rico, June 23, 1981

With absolute fidelity to the fundamental mandate that ". . . any candidate who receives *more votes* than any other candidate for the same office shall be declared elected"—Art. VI, Sec. 4, Constitution of the Commonwealth—although with different grounds and margin, we concur with the decision of the Court that appellant Samuel Cepeda is the winning candidate for the House seat of Representative District No. 35.

Consistent with the main line of thought and juridical conscience of surmounting the obstacles in the dynamics of the electoral franchise set forth in *P.S.P.* v. *Comisión*, decided on December 2, 1980 (80 J.T.S. 92), we will shape the interpretation that in its just implementation sustains that conclusion.

I

The system to challenge ballots, although important in purifying the process so that only legitimate electors can vote, by its very nature of being a drastic intervention against the presumption that every registered elector is able and qualified, besides violating the privacy of suffrage, is of rigorous and strict compliance. A citizen cannot nor should be subjected or open, without constitutional or judicial protection, to easy, vicious, surprising, doubtful, incomplete or defectively made challenges. As a last resort, the preciseness of the juridical view that governs such analysis should not be tainted by the disputes and transitory claims of particular political parties. What is important is not only the constitutionality of the legislation, but also the validity of the State regulations and implementation of restrictive measures in the face of the electorate's voting rights.

In this endeavor it is essential to keep in mind that the word "*recusación*" (a challenge) comes from the word "*recusar*" (to challenge), that in its pertinent definition means "state that a person lacks competence." Now then, the legal term and the challenge procedure is more than simply a poll official or elector observing and stating, in keeping with a specific formality, that a citizen is voting illegally. It is an *integrated* procedure, that is broken down into three stages—challenges, answers and sworn statement—that statutorily specifies a minimum substantial and essential content. For every procedure to challenge, in that polling place three persons are needed and take part in the same: contestant, challenged voter and the inspector that certifies the sworn statement. Let us see. From a reading of art. 5.034[1] one gathers that for a vote to be considered validly challenged it is necessary that in writing, on the reverse of the ballot, the contestant sets down: (a) his

---

[1] It reads:

"Any voter or inspector who has good reason to believe that a voter who has come to vote is doing so illegally, or has already voted in another polling place or precinct, may challenge his vote for the reason that made it illegal, pursuant to the provisions of this Act, but such challenge shall not prevent the person from voting. The ballot of every voter whose vote is challenged, must be marked with the word 'Challenged' on the *reverse*, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge, with Electors Identification Card number of the person affected, the municipality, precinct and number of the polling place. If the challenged voter denies the challenge *he must sign the challenged ballot on the reverse, under oath*, but if he does not deny it, his vote shall not be counted and shall be null and void. *The Administrator shall send to each Polling Place a sample Challenged Ballot to show the Polling Place Board how to fill out a challenge.*" 16 L.P.R.A. § 3234. (Underscore supplied.)

name and his condition as a duly registered elector, supplying information as to his precinct and address; (b) the name of the challenged voter, address, polling place number, precinct and municipality; (c) a brief statement as to the reasons and grounds for the challenge and then his *signature*. On his part, if the challenged voter chooses to deny it, he should state his name, personal circumstances, present address and reasons for said denial. Then the elector shall *sign said denial under oath*. Let us concentrate on this requirement.

The first thing that stands out is that the oath is vitally important, "to submit the [. . . elector] to the penalty of perjury if it is proven that the content of his statements or affidavits are not true. . . ."—*Piñero* v. *Martínez Santiago*, 104 D.P.R. 578, 590 (1976). Second, it is an important cautionary step against any attempt of electoral fraud, which furthers this predominant interest as a rule "that contains sufficient assurances" demanding "him to comply with a simple procedure that duly safeguards the original presumption of validity . . ." "that" ". . . remains intact by virtue of his sworn denial. . . ."—*P.S.P.* v. *Comisión*, *supra*.

Who has the obligation of certifying and verifying the oath (jurat)? What are the consequences when an omission to that effect exists? These doubts are answered by the law itself. The polling place inspectors are the ones ". . . empowered *to administer oaths on the challenges* or complaints presented by any person." Art. 5.035 (16 L.P.R.A. § 3235). (Underscore supplied.) As a corollary, the *jurat*, that is the proof or certification of the oath, is a circumstance that not only depends on the elector's affirmation, but—there being no solemn ritual in particular—on the ministerial and physical act that one of the polling place inspectors, empowered to do so, stamps his signature under that of the challenged elector. In that manner the external manifestation of the elector's intent of taking oath is accredited, so that in transcending the internal value of the

oath before God or his conscience, it has such effective import—within as well as outside the Polling Place—before the rest of society. Note how the sample challenged ballot that the Administrator is required to send to each polling place, as set down by the law, ". . . to show the Polling Place Board how to fill a challenge"—Appendix A of this opinion—undoubtedly affirms this interpretation.

This provision empowering the polling place inspectors to administer oaths, and obliging them to certify the same (jurat), cannot be reduced to a dead letter of the law or be taken lightly. It is an essential part of all the challenge procedure designed by the legislator under the authority of the State in the discharge of the constitutional precept that "laws *shall guarantee* the expression of the will of the people by means of equal, direct and secret universal suffrage and *shall protect the citizen against any coercion in the exercise of the electoral franchise.*" Art. II, Sec. 2, Constitution. (Underscore supplied.)

By virtue of the fact that the challenge procedure is *restrictive of that right to suffrage*, the omission of the *jurat*—as well as the absence of the contestant's signature—should favor the elector to the highest degree. Juridically, in this sense, there exists two roads: (1) that the denial with solely the signature of the elector is deemed sufficient—implicitly containing the oath—and thus the challenge is considered validly denied; or (2) that said omission be deemed a flaw of a substantial nature that infringes and fatally violates the law, and *annuls the whole challenge procedure* in favor of the elector, preventing that the challenge be seen on its merits.

In constitutional-electoral hermeneutics, we favor the second alternative. If the Legislature, by virtue of the statute, contemplated that when an elector does not deny in writing and with his signature, a well-made challenge, *de jure*, his ballot shall be declared *void*, the Judiciary—in harmony with that view—cannot do less than endorse

the same solution when the electoral machinery does not satisfactorily comply with the law. We should not endorse the lax norms, procedures and behavior of those officials that in electoral matters are directly empowered to conduct and supervise its implementation on election day. Especially when the interpretation deals with and forms part of a mechanism that tends to expose the elector to a possible confiscation of his vote, violate its secrecy and weaken the statutory guarantees against fraud. Even though it can be argued that under this interpretation that apparently renders an illogical conclusion—on the grounds that if the law is complied with, and the procedure is completed, the challenge will be seen on its merits—while on the other hand, if said law is not complied with and the certification of the oath and signature of the inspector is negligently omitted, the challenged voter then obtains the benefit of this oversight or hiatus. We do not agree. What would in fact be illogical would be to consider the challenge procedure, the denial and oath as already perfected in law, when the last essential ingredient representative of the external manifestation of the elector[2] is absent, and even so, that he be penalized by a hearing of the challenge on its merits.

We hold that the sacred nature and secretness of the right to vote would be violated and reduced to nothing if flawed, incomplete or insufficient challenges are permitted to promote the discussion and annulment of votes. The price that our democratic system would have to pay would be far too high. In this electoral area we should aim to perfect and better our institutions and reject any attempt toward conformity or mediocre standards.

Summarizing, in the spirit of judicial liberalism that has informed our past decisions with regard to this issue and

---

[2] A similar procedure, with a violation as to its reasons, was required by law to vote, without an electoral identification card, in a closed polling place. Act No. 3 of September 8, 1980, sec. 9.

in our strivings to nurture norms of excellence, we are obliged to conclude, as a basic guideline, that *all challenge procedures that do not comply with the requirements of the law are erroneous and imperfectly carried out, and thus are void. Thus, the ballot in question shall be adjudicated without delay.* Under this doctrine, "requirements of the law" comprises the identification, grounds and signature of the contestant, the sworn denial signed by the challenged voter, and the certification of the *oath* (jurat) of the denial by means of the signature of one of the polling place inspectors.[3] Even though it is desirable, we do not propose or pretend perfectionism of a notarial nature in the asservation or affirmation of the oath. What is important is the signature of the contestant,[4] the challenged voter and the polling place inspector who administers the oath, which if *so implemented* are inseparable and indispensable elements in order to validate the procedure.

> The signature is the graphic representation of the name and surname of a person, in his own hand, in its habitual and characteristic form, stamped at the bottom of a handwritten, typed or printed document, with the sole purpose of subscribing to its content. It is not

---

[3] Of course, excluding such situation whereby the challenge is made and subscribed by a polling place inspector. In the dispute or contest implied in the challenge procedure, it would be absurd, burdensome for the elector and also questionable that the sworn denial be certified by the contestant himself.

[4] From this point of view, and with no reservations, we coincide with the opinion of the Court that the absence of the contestant's signature is an essential flaw that *ab initio* annuls the challenge procedure. It does not suffice, that on the reverse of the ballot the contestant left his handwritten name as proof of his intent, but that the subsequent signature is also required. For the same reasons, the signature of the polling place inspector is also required, that after the challenged voter signs his answer, takes his oath.

necessary that the full name of the person be stamped, because in any way it be subscribed, the signature is valid. *However it may be stamped, it reflects an individual affirmation. In one aspect, it amounts to an intellectual operation, an act directed toward personal identification;* on another aspect, it is an orderly grouping of alphabetical symbols that a person employs in order to designate and distinguish himself. Seen as a whole, the signature is a symbol that summarizes and proves a statement, *an affirmation*, it could be said that it "comes to be the graphic and authentic representation of a person and *the visible and material proof of his affirmation of what was written above.*" From an analysis of the different definitions it is possible to distinguish a more common notion whereby the signature is a vital requirement of inescapable use in public life; it has a particular and generalized importance; in involves an element in identifying the person who made the same; it gives validity to the document that precedes it; and grants a juridical guarantee. 2 Neri, *Tratado de Derecho Notarial* 324 (1969) (Underscore supplied.)

We have seen that the polling place inspectors are called upon to certify the oath. If one of those inspectors fails to do so, the challenge and denial—seen as a whole—does not meet the requirements of the law and is thus useless in the subsequent procedure. In that as in other analogous instances, the presumption of the electors fitness shall not be rebutted and he shall be protected until the conclusion of the voting act and subsequent adjudication of the candidates chosen by him.

"[A]ny ballot cast that has not been correctly challenged and meets all other requirements is a vote deemed unquestionably valid and cannot under any circumstances be subsequently challenged or examined. Considerations such as (1) not knowing the challenged

elector's name; (2) possible violation of the right to a secret ballot; and (3) the impossibility of terminating the electoral dispute, invalidate these sort of post-election day challenges." *P.S.P.* v. *Comisión*, *supra*.

II

A detailed case by case study of the challenged ballots in controversy[5] raised on an appeal show that a substantial number are plagued with fundamental errors, and were wrongly made. In particular, the following challenges were *not* signed by the contestant or the polling place inspectors did not comply with their obligation of certifying the oath (jurat) as ordered by law, and thus, are challenge procedures deemed *void* because they are defective and do not affect the votes of the electors concerned:

(a) In favor of candidate *Osvaldo Molina:* Roberto Pérez, Nellie Cortés, Maritza Pérez Cortés, Jesús A. Acosta Berríos, Angel Tibot Solís and Raquel Rivera Uriquen. These cases affirm, on different grounds, the decision of the Review Board.

(b) In favor of candidate *Samuel Cepeda*: Carlos Rosado Santana, María Soto Dones, Norma Soto Dones, José Luis Castaño, Juan H. Carrillo, Sonia Becerril, Wanda Cotto Cantres, Lydia Cardona Lebrón, Nancy Maldonado Cruz, Ruth Rodriquez Díaz, Migdalia Sánchez Hernández, Iris Sánchez Hernández, Fernando Pagán Rodríquez, Michael Ferris, Carmen D. López Ramos, Gloria López Ramos, Annie L. Pérez Ortiz, Carlos Olmedo, José Montanez Roberto, María del Carmen Elías Medina and José Gonzáles Fontánez. Inasmuch as the Review Board's decision is incompatible with this determination it should be modified.

---

[5] We have limited ourselves to those cases over which we have jurisdiction because they were timely submitted within the term specified by law.

In the light of the foregoing analysis, we subscribe to the Court's pronouncement in what concerns the electors that petitioned for transfer and due to difficulties not attributable to them and omissions in the electoral administrative structure, were not processed: José A. Acosta, Héctor Ramos Aponte, Rafael T. Rodríquez Rodríquez and María Luz Morales Méndez. The Review Board should be reversed.

Also coinciding with the Court's ruling that the following had their residence in Representative District No. 35, the votes cast by Jesusa Vizcarrondo Díaz and Lucía Avila should be counted. For lack of jurisdiction over her person and because of the insufficiency of the service, the vote of Iris Raquel Castaño Monet should also be accredited.

We do not agree with the Court's analysis regarding elector Awilda Moringlane Encarnación. In our opinion the evidence shows that she has been domiciled in St. Croix with her husband for the past several years. Her youngest children, under the custody of the maternal grandmother are domiciled in Vieques. In this case we would affirm the Review Board's decision.

III

We have pondered the alternatives of either remanding the appeal to the Review Board or granting new elections as contemplated in the dissenting opinion. If well both options represent the easiest road to take, our judicial conscience inhibits our concurrence. We explain.

First, the alternative of remanding the adjudication to the original forum is based expressly and restrictively on a strong critical view of the actions of both the Review Board and the Commonwealth Election Commission that necessarily tends to attack the prestige and undermine the quality, competence and public objectivity of said bodies. Second, said solution departs from analogous persuasive

precedents in North American jurisdictions, that on similar circumstances—once the applicable judicial norms for the weighing of the legality of the vote are set forth—have utilized the same methodology uniformly followed by the Court on this day. See *Gerra* v. *Peña*, 406 S.W.2d 769 (Tex. 1966); *Collins* v. *Collins*, 199 S.E.2d 626 (Ga. 1973). And third, even arguing that it is so, how can one justify remanding the issue? What guarantees exist as to the correctness and finality of the decision that would then be issued? Are we not in so doing unreasonably delaying and perpetuating the impasse in the composition of the legislature?

As to the alternative of granting a new election, the reasoning and motives that inspire this recommendation even if praiseworthy, are contrary to the prevailing doctrine regarding the circumstantial background that should exist for such remedies. Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.U.L. Rev. 1092 (1974).

Once again the Island is in a state of rivalries, passionate outbursts and animosities that characterize the public debate and tend to disturb the peace of the community, the stability and security of the institutions. It is an extreme remedy that this Court implicitly and unanimously rejected in its aim to restore to the people the confidence, finality and calmness in the electoral process—in the light of the attack to the certification of the governorship grounded also, among others, on the narrow electoral margin—even when everyone was conscious of the following factual scenario:

> "We cannot seriously deny that the development of the last elections failed to meet our expectations nor that it was exempted from the many flaws which traditionally, and to a higher or lower degree, burden and characterize the process. The narrow margin of votes between the principal political parties—in a sys-

tem in which the law and structure did not provide for this eventuality and where the citizenry is not used to it—has contributed to the general restlessness and uneaseness. The necessary delay, the importance of unavoidable and natural irregularities of a process entailing the mobilization, participation, and decision of more than one and half million (1,500,000) people, and the importance each party gives to each potential vote, all form part of the milieu, intangible premises, and other factors in which the claims of the parties are litigated. *We take judicial notice of the fact that, in this election, some electors were unduly excluded from the lists, that there were double registrations, that there were errors or the correct procedure was not followed with the petitions for transfer of precinct, and that there were many other irregularities.*" *P.S.P.* v. *Comisión, supra.* (Underscore supplied.)

IV

Finally, we endorse the pronouncements consigned in the opinion of the Court, in the way of an epilogue, with regard to the allegation concerning the Review Board's partiality. Cases of this nature tend to exacerbate before the public individual and collective partisan rivalries and animosities. It frequently gives way to analytical errors or superficial criticism or praise of the impartiality and fairness of the adjudicative bodies with regard to the results and not with regard to the correctness, persuasiveness and honesty of the ruling's grounds. This attitude and stance—more than likely the fruit of partisan blindness or misjudgment—overlook the fact that any decisions, ". . . must be based on the full effectiveness of the status of Law, and on the protection of political and social rights which come into play in the administration of the Election Law, and not on political preferences—despite its eminently political organization.

"In the function of passing judgment, whether in boards and other administrative bodies with quasi-judicial powers, or in the properly judicial forum, it is the men of Law who are called upon, more than ever to overcome—*with thoughtful judgment and freedom of conscience in their judicial determinations—the public hysterias that run in step with political passions, assuming the responsibility of reaffirming the rights of man in the juridical-constitutional sphere in order to give to the mandate of the law a valid sense of social utility.*" *New Progressive Party* v. *C.B.E.*, 96 P.R.R. 937, 938-939 (1968). (Underscore supplied.)

In keeping with this responsibility, that cannot be delegated, and in the light of the foregoing, we concur with the decision that appellant Samuel Cepeda be certified as representative for Representative District No. 35, as the only legitimate remedy that in strict juridicity proceeds.

Appendix A

CHALLENGE

I, _____, duly registered elector, of precinct _____ of _____, with permanent address in _____ challenge the vote of elector _____, of polling place _____ of precinct _____ of the municipality of _____ on the following grounds: _____

_____

_____

_____

Contestant

OATH

I, _____ of _____ years old whose legal status is _____ and have my permanent address in _____, Puerto Rico, do under oath declare:

1. That my name and other circumstances are those previously stated.

2. That I deny under oath, the grounds alleged to challenge my vote because they are false.

In _____, Puerto Rico, this _____ day of _____ 19____

_____

Challenged voter

_____

Official administering oath

MR. JUSTICE [illegible]STIS, dissenting.

San Juan, Puerto Rico, June 23, 1981

My judicial conscience is not satisfied with the conclusion arrived at by the Electoral Review Board on adjudicating the results of the election in Representative District No. 35, or with the conclusion arrived at by the Court today in its review of the faulty and confusing records of the hurried proceedings carried out before said Review Board. In such a close election neither of the two decisions guarantee the legitimacy of the victory margins. It is clear to me that judicial intervention is more than wrapping a protective cloak over the proceedings conducted before the Electoral Review Board. Before these serious misgivings, I refuse to grant finality to inconclusive determinations that represent an artificial more than a real purpose. I would order a new election in Representative District No. 35.

I

From the very beginning it is clear that the Constitution of the Commonwealth of Puerto Rico guarantees the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise. Art. II, Sec. 2. That expression of the will or right to vote, that a citizen has constitutes the backbone of democratic society, and any restriction to the right of expressing the same strikes at the heart of representative government. *Reynolds* v. *Sims*, 377 U.S. 533 555 (1964). "And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*

In other words, the citizen has as much right to have his vote count as he has not to have it diluted by permit-

ting that an illegal vote cast by another citizen be likewise counted. To that effect the law permits electors to challenge the vote of other electors if they have "good reason" to believe that they are illegal, on the grounds provided by the law. 16 L.P.R.A. § 3234. This right to challenge protects the right of suffrage, avoiding the vote's dilution. On the other hand, the law permits the challenged elector the right to deny the challenge, thus also protecting his right to vote. *Id.*

The controversies in this appeal arise precisely as a consequence of the validity or invalidity of a number of challenged ballots as well as the answers to said challanges. The modalities that arise from this situation take on various forms that require that they be seen from different juridical perspectives, to wit:

1. If the law states that the contestant shall in the reverse of the ballot make "a brief statement as to the reason for the challenge, signed by the person . . . who issues the challenge . . .", it is then understood that the signature should be at the foot of the statement, and thus to handwrite, "I John Doe, challenge Richard Roe, etc." is not valid if not signed.

2. If the law states that the challenged voter, in denying the challenge, "must sign the challenge, denying it, under oath . . .", it should be understood that the challenged voter should affirm his denial with the expression "under oath", and that the official who took this oath verified the challenged voter's signature.

3. If the challenge because of a domicile discrepancy (the most frequently invoked challenge in the cases in the present appeal) is valid in the light of the norms established by the Electoral Law and, if said norms are to be applied to the facts present in each case, the test used in civil cases should be applied

(contrary to the method utilized in criminal cases), a method known as "the preponderance of evidence" or another more rigorous evidence standard such as "clear, strong and convincing evidence."

4. If the errors committed when the applications for transfer of electors were being filed by reason of change of domicile, during the registration and transferring process, should prejudice the elector if the error was committed by the official in charge of the registration.

Further on I will discuss the principal modalities that the present controversies have spawned. But first, I wish to delve into the prevailing mood that reigned during the crisis provoked by the resulting close margin of votes upon the termination by the Commonwealth Election Commission of the canvassing of the adjudicated ballots cast for the candidates for the office of House Representative for Representative District No. 35 that comprises the precints of Rio Grande (97), Luquillo (98), Fajardo (99), Culebra (100), Vieques (101) and Ceiba (102).

II

The situation began when the Commonwealth Election Commission announced that Osvaldo Molina, candidate for House Representative for the New Progressive Party, had obtained an advantage of five (5) votes over Samuel Cepeda, candidate for the Popular Democratic Party. Before the results were certified, the Popular Party and its candidate Cepeda appealed to the Electoral Review Board challenging the adjudication of thirteen (13) ballots, which was increased later to forty-seven (47) additional ballots, for a total of sixty (60) challenged ballots. The New Progressive Party and its candidate Molina also challenged the adjudication of forty-six (46) ballots, to later raise the same with seven (7) additional ballots challenged, for a total of fifty-three (53) ballots.

In view of the briefs filed before this Court by the contesting parties whereby the Popular Party and Cepeda challenged the original jurisdiction of the Review Board to take cognizance of the challenges filed by the New Progressive Party and the defense of said original jurisdiction by the latter, on December 24, 1980 we authorized the Review Board to consider all the challenged ballots filed by the parties, and we granted the same a seven (7) day term, until December 31, 1980, for the elucidation and resolution of the ballots involved. *Osvaldo Molina* v. *Gerineldo Barreto et al.*, 0-80-713.

On December 29 the Review Board raised the question of its difficulty in determining the cases pending in time for the December 31 deadline set by this Court. It stated:

> 1. That our previous resolution of December 23 regarding the stay of proceedings "caused a serious imbalance because the parties and the Board lost contact and control of the previously summoned witnesses under the Board regulations. Two days of hearings were wasted because the parties did not have the evidence in court. Summons had to be issued again."
>
> 2. That the hearings were continued on Saturday, Dec. 27, from 9:00 a.m. to 1:15 of the next morning, and they recessed by petition of the parties due to the inconveniences that arose in bringing the witnesses on Monday, Dec. 29.
>
> 3. That in the case of the 54 challenges, as well as in the 47 challenges, there were multiple situations, thus requiring the presence of the contestant, the challenged voter and the witnesses for both parties to sustain their allegations.
>
> 4. That in the majority of the cases the electors are from places as distant as Vieques.

5. That they considered that the elucidation and determination of each case, on the basis of two hours per case, would take several weeks.

6. That they needed a reasonable extension of time due to the prevailing circumstances.

Taking the aforesaid into account we granted the Board an additional fifteen (15) day term to elucidate and determine the one hundred and thirteen (113) cases filed.

On January 7, 1981, the Popular Party and Cepeda appeared before this Court and stated, among other things, the following (0-80-713):

> In the processing of these cases it has not been possible to establish any sort of logical order. The evidence that an elector does not reside in a determined precinct is generally followed up by similar evidence that involves another person. The Evidence directed to establishing the condition of legitimate elector of Representative District No. 35 is frequently filed several days later. This, of course, was an indispensable measure taken to safeguard the parts from the haste in which the evidence must be seen, the absence of an adequate opportunity so that the attorneys can prepare themselves and the great difficulty that is present when the means of discovering evidence cannot be fully employed.
>
> The situation has worsened due to the inexplicable delay of the Commonwealth Election Commission in producing the challenged ballots. The absence of this document has spawned frequent controversies, has given way to the filing of useless evidence and has impeded the objections to the presentation of evidence not related to the reason whereby the ballot was challenged on election day.

When the Popular Party and Cepeda refer to the need of taking cautionary steps to protect the recording of the testimony, in order to substitute the same for narrative statements, they stated (0-80-713):

> . . . the very nature of the controversies will make it difficult for the attorney of the two contesting parties to agree on the evidence presented regarding a given elector.
>
> . . . the evidence related to an elector arises in an intermittent manner and could have been spread out during three or four sessions.
>
> . . . the increased number of cases of challenged voters and sessions held will be an obstacle in the utilization of recollection.
>
> . . . the extension of the proceedings have required that both parties use a considerable number of attorneys, who are not simultaneously present in the sessions' room.

In its resolution of the cases appealed the Review Board Stated that (at 5):

> The Board confronted serious procedural difficulties in the hearings of these cases because due to the haste with which they had to be conducted the parties could not file answer briefs nor follow any procedure that under normal circumstances would have simplified the litigations.
>
> The cases were seen in a fragmentary manner and with constant changes in the order of the evidence since the parties were confronting problems in summoning witnesses on so short notice besides the fact that, in the majority of cases they were from places as far away as Vieques, and were people of humble origins and poor academic preparation. If to this we

> add the Christmas season and an irregular schedule, we see that the procedure was the best under the circumstances.

As part of the background of these proceedings, the entire island was in such a tense state of mind because of the prevailing uncertainty with regard to the final electoral returns, that we were moved to reiterate on December 24 (0-80-713) what we previously stated on November 14 in *P.P.D.* v. *Barreto*, 0-80-619.

> The country is going through a period of great difficulty and tension. In these trying times it is necessary to act with serenity and reasonableness. The important issue is that the entire Puerto Rican community should come out winning; that the level of its democracy should not diminish nor the integrity of its electoral process tainted; that our Constitution and our laws be scrupulously respected. We call on the country to keep at all times the maximum calm and restraint.

The above-mentioned circumstances give a clear idea of the difficulties confronted by the Review Board, the contestants, the challenged voters, the witnesses and attorneys for the parties, especially if one takes into account the pressure of time alloted for the litigation on the administrative level by order of this Court that did not realize the magnitude of the proceedings, together with the stirred passions of the general public. It is evident that under those circumstances neither the contestants (protecting the dilution of their vote) nor the challenged electors (in protection of their right to have their vote counted) could have the due process of law in the defense of their respective voting rights. See *Márquez* v. *Insular Board of Elections*, 41 P.R.R. 1 (1930). The proceedings that took place before the Board were so vitiated that its decision with regard to the cases it heard cannot be justified. A close examina-

tion of the transcribed testimonies reveals at least a distrust resulting from the lack of serenity essential to the taking of calm and prudent decisions that inspire some degree of certainty.

Dramatizing the situation even more so was the scarce five (5) vote victory margin of Molina in the Commonwealth Election Commission canvass, and later the scarce victory margin of twenty-three (23) votes by Molina after the appeal to the Review Board, and the present nine (9) votes in Cepeda's favor adjudicated in this Court's opinion. In the following section I will state the juridical flaws I think are contained in the Court's opinion with regard to the utilization of certain controlling standards that it sets forth and adopts.

III

The first standard adopted by the Court abandons the standard of evidence existing in civil cases to the effect that the findings of fact are made in accordance with the preponderance of evidence; and requires, *in electoral cases*, a more rigorous evidence what it calls "clear, strong and convincing evidence." What is surprising is not the adoption of the new standard, but the use of the same to leave without effect the findings made by the Review Board grounded on the standard of evidence in force in this jurisdiction for civil cases pursuant to the provisions of our Law of Evidence, Rule 10(F) that reads:

> In civil cases, the trier's decision shall be in accordance with the preponderance of evidence on the basis of probability; in criminal cases, guilt must be established beyond a reasonable doubt.

The Court concludes as follows:

> When in such a transcendental matter the findings of fact are based on the *wrong* standard of proof, we

> cannot or should not be bound by them. In such circumstances, it is our duty to *reevaluate* the evidence pursuant to the correct standards and make such findings as are proper.

I must begin by stating that I have not been able to find one *electoral* case in this jurisdiction where the standard of "clear, strong and convincing evidence" has been used. Neither have I been able to locate any precedent in the federal jurisdiction where this standard of evidence has been established in *electoral* cases. Consequently, the Review Board could not require a more rigorous evidence than that presently required in civil cases. It did no more than comply with the existing norms of this jurisdiction. If this Court has decided to change said standard of evidence, understanding that it is a constitutional requirement, the least it could do is to remand the cases where said standard is applicable so that the Review Board can evaluate the evidence filed before it in the light of the new standard.

This Court's opinion cites several cases resolved by the United States Supreme Court wherein "clear, unequivocal and convincing evidence" has been required as an evidence standard in cases of deportation of citizens and of denaturalization under the Federal Immigration Act. *Woodby* v. *INS*, 385 U.S. 276 (1966); *Schneiderman* v. *United States*, 320 U.S. 118 (1942). In *Woodby* the Federal Supreme Court required, grounded on the constitutional precept of due process, the standard of "clear, unequivocal and convincing evidence", understanding the same to be more rigorous than the standard of "reasonable, substantial and probative evidence" applied by the Immigration and Naturalization Service. But one must note that in *Woodby* no final resolution was issued in favor of appellant, but the same was remanded by the court to the Immigration and Naturalization Service for the pertinent finding under the stricter standard. One should note that the Supreme Court does not pass upon the case but remands it to the trier of

facts. In *Schneiderman* it also remanded to the circuit court for the pertinent findings with regard to a controversy concerning the denaturalization of an American citizen without the court having proved his lack of attachment to the Constitution with "clear, unequivocal and convincing evidence."

Addington v. *Texas*, 441 U.S. 418 (1979), cited today by this Court, deserves a comment. The case concerns a person involuntarily committed to a mental hospital under Texas law. The State trial court instructed the jury that the state should prove by means of "clear, unequivocal and convincing evidence" that the appellant was mentally ill and required hospitalization for his own welfare and for the protection of others. The jury found, on the basis of said standard of evidence, that he should be hospitalized. On appeal, the Texas Court of Appeals reversed, holding that the standard of evidence should be stricter and required that it be "beyond a reasonable doubt", which is the standard for criminal cases. The Texas Supreme Court reversed and reinstated the appellant's reclusion holding that the standard applied by the trial court (the trier) was more rigorous than the "preponderance of the evidence" standard, and held the latter to be the adequate standard. The appellant appealed to the United States Supreme Court invoking the right conferred unto him by the 14th Amendment. The Federal Supreme Court reversed the State Supreme Court, declaring that the preponderance of the evidence standard was not constitutionally sufficient to deny a person freedom under the appellant's circumstances. But no final resolution was made and it was remanded to the State Supreme Court so that it could determine the standard it would use in cases of involuntary reclusion of the mentally ill, which could not be less strict than the "clear and convincing" standard. It further stated that the "clear, unequivocal and convincing" standard adopted by the trier did not have to be so rigorous if the

State Supreme Court so held. It specifically stated that the term "unequivocal" was not constitutionally required. It added that to meet the due process demands "the standard of proof has to inform the factfinder that the proof must be greater than the preponderance of the evidence standard." (Undercore supplied.) Evidently, the factfinder would have a new opportunity to evaluate the proof under any new and more strict standard imposed by the Texas Supreme Court, but as in *Woodby* and *Schneiderman, supra*, the decision of the State Supreme Court would not necessarily constitute a final resolution of the case.

Because of the applicable juridical content to the cases at bar, it is very pertinent to note the exposition by the Federal Supreme Court in *Addington* v. *Texas, supra* at 423, on the function of the standard of evidence:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

One gathers from the foregoing that when one refers to preponderance of the evidence or clear, strong and convincing evidence, or of any other standard of evidence, one is not merely talking of quality of evidence but more so of the degree of persuasive effect that it should have on the trier, with regard to the importance that the pertinent findings of fact have for the litigants. See McCormick, *Handbook of the Law of Evidence*, sec. 339, 2nd ed. 1972.

According to McCormick, *supra*, the preponderance of evidence criteria can be defined on the basis of probability:

that the trier be persuaded that the existence of the contested truth is more probable than its nonexistence. The clear and convincing evidence standard—or its variance—require not only a greater degree of probability but a greater degree of the fact's existence. *Id.* sec. 340.

Our Rules of Evidence, 1979, in its Rule 10, establish some principles on the weight and sufficiency of evidence on which the trier should make his conclusions of fact:

Rule 10—Weight and Sufficiency of Evidence

The court or the trier of facts shall weigh the evidence introduced in order to determine which facts have been established or proven, subject to the following principles:

(A) The burden of proof is on the party who would be defeated if no evidence were introduced by either side.

(B) The burden of producing evidence is, first of all, upon the party holding the affirmative of the issue.

(C) *To establish a fact,* the degree of proof required is not that which, excluding the possibility of error, produces absolute certainty; *the only requirement is moral certainty or conviction upon an unprejudiced mind.*

(D) Direct evidence from a witness who deserves full credit is sufficient proof of any fact, unless otherwise provided by statute.

(E) The court or jury is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number of witnesses or against other evidence convincing to their minds.

(F) *In civil cases, the trier's decision shall be in accordance with the preponderance of evidence on the basis of probability;* in criminal cases, guilt must be established beyond a reasonable doubt.

(G) When it seems that a party offers evidence that is weaker and less satisfactory than the one it could have offered, the evidence introduced should be viewed with distrust.

(H) Any fact in controversy may be established through direct, indirect, or circumstantial evidence. Direct evidence is that which proves the fact in controversy without inference or presumption and which, if true, establishes the fact conclusively. Indirect or circumstantial evidence is that which tends to establish the fact in controversy by proving another one from which—together with other established facts—one could reasonably infer the fact in controversy. (Underscore supplied.)

Thus, when the standard used is the preponderance of the evidence the party that has the obligation and burden of persuading the trier on the existence of a fact, should offer proof of such credibility and sufficiency that when the trier puts it in counterbalance with the contesting evidence, he can conclude that the occurrence of the fact is more probable than its non-occurrence. As the strictness of the standard of evidence increases, likewise the trier's certainty augments with regard to the correctness of his conclusion.

This process of receiving and weighing the evidence is subjective and complicated, influenced by an innumerable array of factors that are difficult to fully grasp particularly that relative to the credibility that the trier has given to the evidence, weighing which is practically forbidden to an appellate court. That is why, in the absence

of manifest error, passion, prejudice or partiality, this Court does not normally intervene with the trial court's weighing of the evidence. *Pueblo* v. *Millán*, 110 D.P.R. —— (1980), 80 J.T.S. 74; *Pueblo* v. *López Pérez*, 106 D.P.R. 584 (1977); *Morán Simó* v. *Garcia Cristóbal*, 106 D.P.R. 155 (1977); *Community Partnership* v. *Pres. Hosp.*, 88 P.R.R. 379 (1963); *Commonwealth* v. *Cía. de Ferrocarriles de P.R.*, 83 P.R.R. 565 (1961).

In dealing with administrative body decisions, recognizing the particular expertise that each body has with regard to the cases they see, the established standard is that not only findings of fact sustained by evidence based on the whole record be accepted, but also particular deference should be given to the conclusions of law of the administrative body. See *J.R.T.* v. *Escuela Coop. E. M. de Hostos*, 107 D.P.R. 151 (1978), Mr. Chief Justice Trías Monge, concurring.

The Electoral Law itself gives effect to the principle of limited review when providing in its art. 1.024 (16 L.P.R.A. § 3024):

> The findings of *fact* of the Board shall be final, but any aggrieved party may bring an appeal for review to the Supreme Court of Puerto Rico based on questions of *law*. . . . (Underscore supplied.)

The Electoral Review Board, that had all the voluminous evidence presented by the parties, made some findings of fact keeping "in mind" the degree of certainty that has been traditionally required in civil cases. In the complicated and confusing context of the present case, upon changing the degree of certainty that is now constitutionally required, stricter than the existing standard, this Court cannot ipso facto place itself in the same position as the Board in order to carry out an independent weighing of the evidence by virtue of a new standard. This is

particularly evident when one takes into account that the Board received a considerable volume of evidence within the short time alloted to it by this Court, and was thus obliged to summarize the evidence, without necessarily signalling out the evidence if deemed credible from that which it dismissed as meritless, limiting itself to stating that the preponderance of the evidence sustained this or that conclusion. (We note that while in some cases it did state which of the summarized evidence merited credibility, in others it left out evidence received from its summary, and still in others it included conflictive evidence.) Hence it is impossible for this Court, even if it could reweigh the evidence, to determine if the same is clear, strong and convincing to sustain a specific fact, if it only comes forth that the Board found preponderance of evidence of the occurrence of that fact, without there being any indication as to what specific evidence was considered and which was rejected. Even assuming that this Court would have upheld the preponderance of the evidence standard used by the Electoral Review Board, it would not have been able to reweigh the evidence filed before the Board taking into account the principles set forth above contained in Rule 10 of the Rules of Evidence and particularly the primordial subjective element relative to the credibility give to said evidence by the factfinding Board.

From the principles on the weighing and sufficiency of evidence that we have examined one gathers that the evidence standard not only constitutes a guideline for the trier with regard to the degree of conviction that his findings of fact should carry, but it also informs the parties as to the sufficiency and quality of the evidence that they should present in order to persuade the trier of their position. The parties in this case—challenging parties and challenged voters represented by their political parties—that in the defense of their respective electoral rights presented evidence that they assumed was sufficient enough to prevail,

in the light of the traditional standard, have an evident right under the minimum rules of the due process of law to file evidence that can comply with the new standard whose application was first established by this Court for electoral cases in determining controversies and Electoral Law provisions that heretofore we had never contemplated. The fact that the Court assumes today the prerogative of reweighing the evidence under the new and surprising clear, strong and convincing evidence standard represents a clear violation of the due process of law that protects both contestant and the challenged voter, and that this Court is obliged to protect by virtue of the Constitutions of the Commonwealth of Puerto Rico and the United States.

IV

The second standard adopted by the Court rejects the validity of the challenges made on the reverse of the ballot in which the contestant did not stamp his signature at the foot of the note containing the reason for the challenge. The Court grounded its decision on the definition of the word "firma" (signature) given by the *Diccionario de la Real Academia Española*, to the effect that it is the name and surname, or title, of a person which he stamps at the close of a document written in his own or with someone else's hand, in order to signify its authenticity or to bind himself with the statements made therein. It then gives as an example the solemn statutory requirement for holographic wills in the sense that the signature should conclude, close or end it. 31 L.P.R.A. § 2161; *Castañer* v. *Superior Court*, 81 P.R.R. 841 (1960). With regard to the requirement of a signature in holographic wills, Puig Peña states that the signature is what distinguishes the final will from the proposed will. V-1 Puig Peña, *Tratado de Derecho Civil Español* 242, n. 34. It is thus so that after the testator's death, there is certainty that the will was concluded, and thus the law does not recognize the additions

that appear after the signature unless these are also signed and dated, so that the signature is demonstrated as the "last subscription of the testamentary will, after the whole text preceding the signature is known and considered." *Castañer* v. *Superior Court*, *supra* at 844. The solemnity required for holographic wills is not required by the Electoral Law with regard to the contestant's signature, since not even the challenge has to be made under oath nor does it impose legal sanctions of perjury. 16 L.P.R.A. § 3234, *P.S.P.* v. *Comisión Estatal*, 110 D.P.R. —— (1980), 80 J.T.S. 92. The informality of the proceedings is such that it only requires that the contestant have grounded motives to believe that the vote is illegal for any of the reasons provided by law.[1] *A contrario sensu* the law requires that the challenged voter, in order to have his vote counted, has to "sign the challenge, denying under oath." Thus, the denial constitutes a formal act vis à vis the informality of the challenge.

The ballots rejected because of the absence of the constestant's signature essentially state the following: "I, John Doe, challenge voter Richard Roe, because he does not reside in precinct X." Even though the name of the contestant is not at the foot of the note including the challenge, it is in his own handwriting and under his name and responsibility that he states the reason for the challenge. Is it necessary that he signs his name once more to reaffirm that what he stated is true? We understand that the oversight of not having signed the challenge is due to the fact that the printed form that was originally required by law to be attached to the ballot, and which contained the blank spaces that served as guidelines for the contestant in the challenging process, was discarded by a subsequent amendment, that only required the Administrator to send to each

---

[1] The Court does not consider the constitutional implications with regard to the informality of the act of challenging a voter.

polling place "a sample challenged ballot *to show* the Polling Place Board how to fill out a chalenge." (Underscore suppied.) Act No. 4, December 20, 1977, as amended by Act No. 3, September 8, 1980. Aside from this sample whose aim is *to show* the Board, the law does not contain any final provision to clear up the form requirement, and neither is it contained in the Regulations of the Commonwealth Election Comission, adopted to implement the Electoral Law. Approved on October 1, 1980. It was thus incumbent upon the Polling Place Board to guide and supervise the challenge process so that it could be effective. The fault of the Polling Place Board is failing to warn the contestant that, besides writing down his name, he should sign the challenge at the bottom of the same, should not annul the right of an elector to challenge another elector in order to protect the dilution of his vote and thus his right of suffrage.

The *Diccionario Enciclopédico de Derecho Usual* divides the concept of "signature" into what it considers its two components, to wit: (1) its material expression and (2) its value. Insofar as its material expression and (2) its value. Insofar as its material expression is concerned, Professor Lessona, professor of Civil Procedure in the University of Siena, states: "that *signatures* have been monographically dealt with, states that it has not been defined by law, a laudable situation that adjusts itself well to the antiformalist spirit of modern Law." Lessona also states that "[*W*]*hat the law requires is the expression of the person's identity and of his handwriting;* in which case the judge shall verify the same." (Underscore supplied.) Insofar as the signature's value, the aforecited dictionary states that "[T]he signature confirms the appearance of the person and the conformity with the facts and statements subscribed therein, except if it is obtained by surprise, fraud or violence." III *Diccionario Enciclopédico de Derecho Usual*, 14th Edition, Editorial Heliasta, 1979.

After taking a look at the meaning of what constitutes a signature, as defined in the prestigious work of the author cited above, one is obliged to conclude that the contestant, having handwritten his name, and having expressed his conformity with the facts and statements voluntarily subscribed, convinced the challenged voter, in each case, of the seriousness of his action, motivating thus the latter's denial of the same. A better demonstration of the efficiency of the contestant's action is hard to find. If the challenged elector had any doubts that the contestant was not attempting to challenge him one should suppose that he would not have answered the same. One should presume that in said circumstances the reciprocal actions of both the contestant and the challenged voter are valid. It is significant to note that both the Commission and the Board accepted the challenges as valid, even when they were not signed by the contestant at the close of the statement, presumably considering the contestant's affirmation in his handwriting, and with his name also handwritten, as complying with the signature requirements of the law. One should note that the Board considered the nine cases involved in the dispute on their merits without the technicality of the signature being an obstacle.

V

We shall not go into the consideration of the remaining standards set down by the Court, because we are of the opinion that those discussed herein are sufficient to sustain a different result than that reached by the Court today. Neither will we venture into an analysis of the merits of each ballot appealed, because we understand, as we have stated at the beginning of our dissent, that the procedures that took place before the Board were vitiated by the irregularities caused by hasty, disorganized and misguided proceedings, caused no doubt by the time limitation we imposed on them, overlooking the magnitude of the problem involved in mobilizing people, preparation of evidence by

the contesting parties and the difficult task required of the Electoral Review Board. To give an idea of this it suffices to mention that: the transcript of the testimonies contains around 6,000 pages; the proceedings were taped in 47 tapes, each 4 hours long; the Board's resolution is almost 200 pages long, and the hearings held at the Board were from 9 in the morning until 12 midnight, sometimes ending in the early morning hours.

We conclude our dissent emphasizing the two standards set forth above, that in our view are errors contained in the Court's opinion. One of them is the interpretation that the Court made invalidating with one swift stroke the challenge made by an elector without taking its merits into account, because the contestant's signature was not at the close of the challenge, notwithstanding the fact that he stated the reasons for the challenge and wrote down his name. In so deciding, this Court has denied the constitutional right of suffrage that safeguards against the dilution of the contestant's vote. *Reynolds* v. *Sims*, 377 U.S. 533, 544, 555 (1963).

The second error is committed when this Court, in violation of basic constitutional precepts of due process, reweighs the evidence previously weighed by the Electoral Review Board, disregarding the preponderance of evidence standard used by the Board, and imposing at an appellate level a new standard unknown to the parties involved and to the body that was trier of the facts. All this contravening the procedural norm followed by the United States Supreme Court in *Woodby* v. *INS*, 385 U.S. 276 (1966) and *Addington* v. *Texas*, 441 U.S. 418 (1979).

In view of the circumstances we have already mentioned with regard to the atmosphere of tension, confusion, alarm and hastiness in which the Electoral Review Board proceedings were carried out, the result of which was a record that reveals defficiencies in the facts of such gravity that they cannot be used as basis to assert the rights of the

aggrieved electors; and, furthermore, taking into account that the conclusions of law on which the Court's opinion is grounded are repugnant to the constitutional rights of the aggrieved electors. I believe that neither this Court, nor the Board, if the case were remanded, would be in a position to determine with certain finality who was the candidate that the qualified electors tried to elect as representative for Representative District No. 35, whereby I conscientiously cannot reach another conclusion other than ordering a new election for House Representative for Representative District No. 35.

APPENDIX B

Case No. JR 80-284

ABOUT: ADJUDICATION OF BALLOTS
POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA

V.

GERINELDO BARRETO PEREZ
General Administrator of Elections and OSVALDO MOLINA

Case No. JR 80-285

ABOUT: ADJUDICATION OF BALLOTS
OSVALDO MOLINA

V.

GERINELDO BARRETO PEREZ
General Administrator of Elections and SAMUEL CEPEDA

RESOLUTION

On December 17, 1980 the first of these cases was filed under the number JR 80-274 and thus successively in later days until December 22 with case JR 80-285.

The Board set public hearings to be held on December 18, 1980, at which date the cases JR 80-275 to 80-281 were filed. The Board united all the cases because it understood that they were related with situations of common facts, involved identical parties and dealt with the same controversy about the winner of Representative District Number Thirty-five (35)[1] which comprises the precincts of Rio Grande (97), Luquillo (98), Fajardo (99), Culebra (100), Vieques (101) and Ceiba (102).

---

[1] The case is related and question the acts of the State Commission of Elections in the adjudication of the challenged ballots, calculations, etc., in Representative District Number Thirty-Five (35) which demonstrate that Mr. Osvaldo Molina won by 5 votes of advantage over Mr. Samuel Cepeda.

The Popular Democratic Party opposed the consolidation of the cases and appealed to the Supreme Court, that finally resolved the matter by ordering that the Board would elucidate and resolve all the cases.[2] The Board continued the hearings [3] and proceeded, for the same previous reasons, to unite the cases JR 80-282, 283, 284 and 285 filed later on by both parties.

The Board assumed jurisdiction under the dispositions of Article 1.022 clause (1) and (6) of the Electoral Law that disposes as follows:

> "Article 1.022—Faculties, Obligations and Duties of the Board—In addition to whatsoever other faculties, obligations and duties disposed in that Law or in its rules, the Board will have the following:
>
> (1) To investigate and resolve, at first instance, any actions initiated or promoted by the electors, in accordance with Article 2.001 of that Law, about the Rights and Prerogatives of the Electors.
>
> (6) To investigate and resolve in appeal any resolution, decision or order of the Electoral Commission."

The Board also has its source of jurisdiction in the Resolution itself of the Honorable Supreme Court of December 24, 1980 when it said in the pertinent part:

> ". . . . the only effective remedy in the particular circumstances of the present case constitutes, in our opinion, the recognition of the authority to end the

---

[2] Resolutions Per Curiam of the Supreme Court of Puerto Rico of December 24, 1980.

[3] The daily schedule of the hearings was from 9:00 A.M. till 12:00 midnight (on various occasions we extended the sessions until dawn).

adjudication in substance, already started, of the challenged ballots in the said Representative District Number Thirty-five (35), to the Review Board, in accordance with Article 1.002 (sic) of the Electoral Law."

The Board was confronted with serious processal difficulties in the hearing of these cases since it had to proceed in a haste, the parties could not file responsive arguments nor any procedure that under normal circumstances would have simplified litigious matters.

The cases were seen in a fractioned manner and with constant alterations of the order of the evidence since the parties were confronted with the problem of summoning the witnesses in too short a period of time and the same were in their great majority from distant places as far as Vieques, in addition of being humble people and of little academic preparation. If to all this, we add the Christmas period and an irregular schedule, we see that the procedure was the best under the circumstances.

The Board before the situation of facts that serves us as background proceeds to explain the proven facts and dispose of each one of the cases in a separate manner thus preventing the confusion of facts and parties.[4]

The exposition of facts does not follow the order in which the cases were elucidated but the numerical order of the filings and in the said exposition we proceed to identify the challenged elector, the party that challenged him and the witnesses and documentary evidence presented in support of the respective litigations and for individual cases.

---

[4] We consider each challenged elector as a party as to the effect that he would defend his vote and that the same be legally adjudicated.

CONCLUSIONS OF LAW

The Board understands and resolves that any dispositions and adjudication of an electoral controversy should have as a point of support and reference the principle of "the advantage of the electoral rights of the citizen over the rights and prerogatives of all the political parties and associations." (Article 2.001 (11)).

The Article 1.023 of the law [5] establishes and disposes the procedure to review the decisions of the State Commission of Elections to wit:

"....

(e) Every agreement of the State Commission of Elections should be approved by unanimity of the votes of the Commissioners present at the moment of carrying out the voting or casting of votes. Any matter submitted to the consideration of the said Commission that does not receive such unanimity of votes will be decided, in pro or against by the General Administrator of Elections whose decision will be considered as the decision of the State Commission of Elections and could be appealed in the form provided in the Article 1.023 of this law.

....

Article 1.023—Appeals of the Commission—Any party affected by a resolution, decision or order of the Commission will be able to appeal to the Board, within a term of five (5) days after the notification of the same, through the filing of a writ of appeal before the Board."

The challenged ballots should be adjudicated within a procedure that is in harmony with Article 6.003 of the

---

[5] Law Number 4 of December 20, 1977, known as Electoral Law of Puerto Rico.

Electoral Law and of Rule 62 of the Regulations of General Elections of 1980.[6]

The said adjudication should be made within a procedure of law such as a notification to the elector, the summoning of witnesses and defile and appreciation of evidence before the Electoral Commissioner or its examiner.[7]

To determine the domicile and/or legal residence of an elector, we should establish a uniform norm based on objective criteria. The same should be done with the challenges and the transferences. Immediately afterwards, we expose the objective criteria in which we base our conclusions about these themes:

1. Domicile

The Article 2.004, of the Electoral Law of Puerto Rico (16 LPRA 3054) disposes as follows:—"Domicile of the Electors—

For the purposes of this law, the domicile of an elector will be that which constitutes his legal residence and the same will be determined in compliance with the following norms:

(a) Every person has a domicile.

(b) There can only be one domicile.

(c) The legal residence or domicile is the place where a person usually resides, when he or she is not called to another place to work or for any other temporary purpose and to which he or she returns at leisure time.

---

[6] Case 0-80-713, Opinion Per Curiam of the Supreme Court of Puerto Rico of December 24, 1980.

[7] Ibid, the Board assumed primary jurisdiction.

(d) The domicile or legal residence can be changed by the union of the act and the intention.

(e) One cannot lose a domicile until one acquires a new other one."

In this Board's opinion, this Article established the principle that an elector cannot claim two domiciles at the same time and its purpose is obvious: to avoid that an elector could elect among as many places as he would claim to have a domicile, in order to exercise his right to vote because that would bear or result in that in some precincts or districts the electoral results would be different. The purpose of the contents of this Article is to deny the fulfillment of this possibility and for that purpose it establishes that the principal criterion to be identified in order to determine the domicile of an elector is that of his *usual residence.*

As to the residence, Castán indicates that in its common sense:

> "residence is the existence or permanence, more or less continued, of a person in a place of space, and in the juridical sense, as De Diego says, the existence of a subject of right in a specific place, where he can exercise his juridical capacity."

José Castán and Tobeñas, Spanish Civil Law, common and statutory, Tome I, Vol. II, 9 a ed., Page 125.

Castro and Bravo on their part point out when referring to the same theme that:

> "the residence means to be in a place; the residence is there where one dwells or lives as the place of the same dwelling (house-room, home or a boarding house which is not a transitory home)."

Federico de Castro and Bravo, Civil Right of Spain, Tome II, Chapter VI, Page 457.

Puig Brutau adds that the residence:

> "supposes a permanence which is more or less stable and that the same could originate simply the residence if it were dealing with an occasional permanence, or the domicile if it were dealing with a permanence or usual residence."

José Puig Brutau, Undelying Principles of Civil Rights, Tome I, Vol. I, Page 136.

These definitions point us out that the residence is a term that in its broad and general sense implies to be located in a specific site or place, but in order that the said location denote some shades and juridical consequences, the same has to be usual instead of occasional. We understand that this distinction between usual and occasional should be the crucial element to set the concept of domicile. Some authors point out that the distinction is essentially subjective, that is, that it is the will of the person through his intention of staying or residing in a place in a usual form. Pérez González-Alguer, Treatise of Civil Rights, Tome I, Vol. I. Others think, however, that the usualness is the distinctive sign of the domicile and what separates it from the mere residence by reason of its continuity in the place established, without taking into consideration the duration of the stay in its character or permanence or perpetuity. See de Castro and Bravo, Op. cit., Page 459. That is, the usual residence should not be confused with the perpetuity nor with the indefinite residence. The element of intention manifested through having or not having a domicile in such a place could be a sign of the fact that the usual residence would exist or would stop existing, but it does not creates it or alters it by itself. De Castro and Bravo, infra.

In Puerto Rico, the intention is one of the criterias used to determine the domicile of an individual. *Martínez* v. *Vda. de Martínez*, 99 DPR 443; *González* v. *Secretario de Hacienda*, 76 DPR 135; Sureda, 22 DPR 667.

The intention of residing with usualness is what distinguishes the domicile from a mere residence in which there might also be intention, but only of residing in an accidental or transitory manner.

> "If such intention of establishing the permanent domicile or residence does not exist, the person would be a mere sojurner or passer-by." *Sureda* v. *Sureda*, 22 DPR 667, 669.

Now then, the criterion of intention or animus manendi will only be taken into consideration when it agrees with a residence that is objectively usual, in such a manner that in a case of disagreement, when there is a lack of a residence that is objetively usual and there exists a subjective will of the individual of having this residence without the usual element and also a *subjective* will of the individual to want to have this residence without the usual element, this last one would lack relevance that is, that as what concerns this person, the domicile that results of an objective, real and effective usual residence will be the one asserted as domicile: As Diez Picaso says,

> "the usualness should not be understood, in a subjective sense, as a special intention or a special aim of the person: an intention of definite permanence. It should be understood, on the contrary, in a realistic and objective sense, making an abstract of the purpose, intention or will of the person." Luis Diez Picaso, Lectures of Civil Rights, Tome I, Chapter IX, Page 141."

Therefore, we have that the concept of domicile comprises two elements:

1) the physical residence;

2) the usualness in that residence which demonstrate the intention of the individual to stay in it (animus perpetuo commorandi).

"It suffices that a person be established in a place with the intention of staying in it, so that it be understood that he has constituted or established his civil domicile there. Diego Espín Cánocas, Spanish Civil Rights Manual, Vol. I, Chapter XII, Page 145."

But there may be cases in which a person has various residences and which he might occupy with a more or less equal usualness. The definitions previously exposed lose utility in these cases since they do not provide for this type of situation that allows the possibility of having a plurality of domiciles.

Once more, in Puerto Rico, the prevailing norm reigns by which a person can only have one domicile, and that in order to change it, the union of the act and of the intention are required. In these cases, the norm that prevails in other jurisdictions is that when two residences can constitute two homes for the same individual, it will be that one that constitutes his main home.

"As between two homes, a person's principal home is that to which he is more closely related to or, stated in other words, that which is more nearly the center of his domestic, social and civil life. This will normally be the home where he and his family spend the greater part of their time. American Law Institute Restatement of the Law, Conflict of Laws 2d, Section 20."

Before the question of which of the two (2) or more residences constitutes the domicile of a subject, we find the following criteria that serves as a basis for the decisions we are to take:

"Whether the place where a man lives is his home depends primarily upon the degree of the intimacy of

his association with it. The elements which are to be considered in determining whether a sufficient intimacy exists to make the place a home may be summarized as: A physically appropriate dwelling place; a reasonable amount of time spent there; the things which constitute the man's principal activities done there; the persons and things intimate to him customarily present there; the attitude of intimacy towards the place; and an intent, when absent, to return there." Death and Taxes are Uncertain—But what of Domicile? 53 Harv. L. Rev. 84.

Commenting about the difference between the intention of a subject of establishing his domicile in a certain place and the fact that he lives and performs his activities in another place the same source expresses to us:

"A man may live and make his home wherever he wants to, but when he has done so and it becomes necessary for the law to fix his domicile he does so on the basis of 'the man's general habit of life' and on the facts as he patterned them, not on the basis of where he wanted to be domiciled or thought that he was domiciled or said that he was domiciled. A man's intention, desire or understanding as to where his domicile or legal residence is, has no materiality. It has been said that 'a man's home is where he makes it, not where he would like to have it. It might also be said that 'a man's domicile is where the law fixes it, not where he tries to put it.' The man himself fixes his home; then the laws fixes his domicile. As we have said, a good deal of the uncertainty in the minds of judges, lawyers and lawmen has been created by the failure to appreciate the importance of the facts of the man's life as distinguished from his intentions."

To determine the usualness with which a person resides in a certain place is a matter of facts, which remains re-

served to the appreciation of whoever is judging. Federico Puig Peña, Treatise of Spanish Civil Rights, Tome I Vol. II, Page 198. The physical residence (first element of the domicile) does not constitute a serious problem of evidence, as is demonstrating the intention of the subject of usually residing in that place.

In order to establish that usualness, pieces of circumstancial evidence are usually used so to allow the formulation of inferences about the attitude of an individual, as what respects the place where he resides. The evidence that can be presented could be divided into (a) *formal statements*—legal and public documents such as deeds, affidavits, wills, contracts, letters, driving and car licenses, bank accounts, light, water, telephone, income tax return forms, etc., (b) *informal statements*—have a greater weight since it is presumed that when the subject makes spontaneous manifestations about his residence, he is not motivated by personal interests that may invalidate the sincerity of his statements, but that he does them motivated by the pleasure that he feels of being established in the place where he lives. Examples of this type of statement will be commentaries about the desire of being buried in the place where he resides, the desire of improving his home, etc., (c) *Acts*—residing at a place for a considerable period of time is persuasive evidence that his domicile is there. The place where the husband or wife and the children live drives one also to infer that that it constitutes the domicile of a subject. If the work of a person is permanent and he resides near it, it would not be illogical to assume that the said residence constitutes his domicile. Other data that allows an inference will be membership in a church or parish, membership in clubs or other civic or social organizations. All those factors tend to demonstrate a feeling of public responsibility, which indicate that the person is connected and established in a certain community.

Restatement of the Law, Conflict of Laws 2d, Section; 61 Harv. L. Rev. 1232.

To conclude as a matter of right, which constitutes the domicile of a person within the context of Article 2.004 of our Electoral Law, we have followed the criteria here sketched or outlined.

2. Challenges of Recusations

Article 5.034 of our Electoral Law in its pertinent part disposes:

> .....The ballot of every elector whose vote be challenged should be marked on the back with the word "Challenged" followed by a brief annotation signed by the person or the examiner of the polls that make the same, exposing the reason of such challenge, the number of the Electoral Identification Card of the concerned person, the municipality, precinct and number of the electoral poll. If the challenged elector denies his recusation, he should do so under his signature and oath on the back of the ballot, but if he would deny it, his vote will not be counted and it will be void. . . ." See 0-80-658, *Luis A. Ferré, et al and Oreste Ramos, et al*, v. *Comisión Estatal de Elecciones and Gerineldo Barreto Pérez, Administrator;* 0-80-664 *Partido Socialista Puertorriqueño* v. *Junta Revisora Electoral, et al.*

Rule 63 of the Rules for General Canvass of the General Elections of November 4, 1980, proclaimed by the State Commission of Elections, in virtue of the Article 1.013 (L) and 6.008 of the Electoral Law of Puerto Rico, disposes the criteria that should be used to challenge votes and these criteria are the following:

A) That the elector is not a qualified vote in Puerto Rico;

B) That the elector is not 18 years old by the date of general election;

C) That the elector has voted another day in another poll;

D) That the elector is not whom he says to be;

E) That the elector, though he belongs to the Precinct is voting at a poll where his name does not appear in the list.

The State Commission of Elections, on November 19, 1980, adopted among others the following Rules of Canvass —which in effect complement Rule 63 transcribed above in its pertinent part:

"……2. The basic elements of a challenge or recusation are: name of the challenged elector or any other data that identifies him or her, cause of the recusation and signature of the challenger.

3. Any recusation based in a cause which was not foreseen by law *will be null and does not require an answer.*

4. A recusation that is based on the evidence required by law at the canvassing table *will not be adjudicated at the same and will be forwarded to the State Commission* in a sealed envelope together with the evidence.

5. *All the recusations will be enumerated in a form,* that will be carried out by all the officials at the table.

6. The incomplete recusation in which the name of the challenged voter, the cause or the signature of the challenger cannot be supplied, *will be considered as not been placed there and the ballot will be adjudicated at the table.*

7. The recusation of officials of the polls, who vote out of the polls, where they appear in the lists, *does not require contrastatement.*

8. If a challenged voter accepts the recusation and indicates his new address, *that ballot is sent to a special*

table for its adjudication of the corresponding contestants.

9. If out of the same recusation a new address of the challenged voter comes forth, *a contrastatement is not required.*

10. If the incomplete recusation would be completed with the data provided by the challenged voter, *the ballot will be adjudicated at the canvassing table and the fact of the recusation will be annotated in the corresponding report.*

11. A complete recusation that is not answered by the challenged voter, even if he signs it, *will be considered as not adjudicated and will be referred to the State Commission of Elections"*.....

Subsequently, the State Commission of Elections, on November 25, 1980, adopted the following agreement in relation to the recusations:

"The basic elements of a recusation are: name of the challenged voter or of any other data that would identify him or her, cause of the recusation and the signature of the challenger.

Rules of Canvass:

1. The incomplete recusation in which the name of the challenged voter, the cause or the signature of the challenger could not be provided, will be considered as not been placed there and the ballot will be adjudicated at the table.

2. The recusation of the officials of the poll, that vote out of the poll wherever they appear, does not require a contrastatement.

3. If the challenged voter accepts the recusation and indicates his new address, that ballot is sent to a spe-

cial table for the adjudication of the corresponding contestants.

4. If out of the same recusation the new address of the challenged voter comes forth, a contrastatement is not required.

5. If an incomplete recusation would be completed with the data that the challenged voter supplies, the ballot will be adjudicated at the canvassing table and the fact of its recusation will be annotated in the corresponding report.

6. A complete recusation that has not been answered by the challenged voter, even though he signs it, will be considered as not adjudicated."

Finally and concerning the matter of recusation that engages our attention, the State Commission of Elections with date of December 3, 1980, adopted the following agreement:

....."RULE 10. If the incomplete recusation would be completed with the data supplied by the challenged voter, the ballot will be sent to a special table."

....."Rule 11. A complete recusation that has not been answered by the challenged voter, even if he signs it, except if it were by exclusion or double inscription, will be considered as not adjudicated and the ballot will be annulled at the canvassing table."

When we make our Conclusions of Law in matters of recusations, we have followed the criteria of challengers established by the State Commission of Elections in the Rules and Agreements transcribed above.

3. Tranferences

Concerning transferences of electors, our Electoral Law disposes in Article 2.014 as follows:

"Transferences of Electors, Renewal of Card—The Commission will establish, through regulations, a system so that any registered elector could request that, because of change of domicile, his inscription, from one precinct to another one, be transferred."

Article 2.015 establishes the course that the applications of transferences follow and to that effect disposes:

"Publication of Modifications in the Register—

Every six (6) months, the Commission should publish the lists which contain the inclusions, exclusions and transferences of a stable character that are worked in the Register. In such lists the name, address and electoral number of each person comprised in it should be stated in writing. These will be exhibited to the public in the usual place where the Local Commissions meet and a copy of them will also be given to the Electoral Commissioners and to the central governing organisms of the political parties."

Article 2.016 establishes the deadline for the transferences when it disposes:

"Deadline of Inscriptions and Transferences—

The inscription of any potential elector for an election will not be authorized since fifty (50) days previous to an election.

The transference of any registered elector for an election will not be authorized since one hundred twenty (120) days previous to an election. The full right of the elector to cast his vote in the precinct where he registered is guaranteed when the change of residence to another precinct occurs within the one hundred twenty (120) days previous to the votation."

In other words, the Article 2.016, supra, establishes as deadline to process transferences until July 7, 1980.

In virtue of the authority granted by the Electoral Law, the State Commission of Elections by Resolution of May 15, 1979, established the procedure to follow in cases of transferences and to that end Rules 3.15 and 16 dispose:

R-3 Transferences

Every elector that has registered previously and that would have changed his domicile, should file a petition so that his inscription be transferred from one precinct or city district to another one. The petition of transference will be filed in original and six (6) copies before the officials that constitute the Board of Inscription.

R-15 Transferences

a. Every duly registered elector that would have changed his domicile, should file a petition of transference before the Board of Inscription nearest to his residence within the precinct of his new domicile.

b. The said petition of transference will be fulfilled in the form provided for such purpose in original and six (6) copies, distributing them the same way as it is disposed for petitions of inscription in Rule 12.

R-16 Adjudication of Inscriptions and of Transference

a. The State Commission of Elections will prepare the organization of technical resources to allow that the appropriation be made at the state level of the corresponding district of inscription for the petitions of inscription and of transference.

b. In the cases of valid petitions of transferences, the exclusion of the petitioner of the precinct in which he was originally registered will be ordered and his inclusion in the precinct where he has established his new domicile will be ordered.

Foreseeing that the petitions of transferences could be suffering from formal defects or that the same might lack the required information in order to allow its processing by a computer, the Commission by unanimity and through a Resolution of October 28, 1980, established the following criteria to adjudicate votes of the electors that were not residents of the precinct where they would cast their votes, Resolution that in its pertinent part reads as follows:

> *Case A*—In the cases of the electors that have requested a transference and the same was not processed, or if the elector was not well situated by the Commission, the elector should take with him his copy of the transference or could ask for a photocopy from his political party or from the Board in order to assure such situation. In these cases the elector should appear in the list and his vote will be fully adjudicated in the poll.
>
> *Case B*—Those electors that without having made a transference, by an error have been wrongly situated out of the precinct where they usually live, should vote where they appear in the list and their vote will be fully adjudicated in the poll.
>
> *Case C*—In the cases of electors that appear in the lists of the precinct where they do not reside anymore and that did not file a petition of transference, they could cast their vote where they appear in the list but their vote will be challenged and will not be adjudicated in the poll.
>
> If it were necessary, the adjudication will be made by the State Commission during the general canvass, but in every case it will only be counted for the offices of Governor, Resident Commissioner, Senator and Representative at Large and depending where he resides, it could have local validity.

These electors should indicate under oath their new address expressing the municipality and precinct, if they know them.

When settling the controversies before us in the adjudication of votes of the electors, who had or did not have petitions of transferences and who were not residents of the precinct where they voted, we followed the abovementioned criteria.

4. Electoral Distributions

Representative District Number Thirty-five (35) comprises the electoral precincts 97 (the Municipality of Río Grande), 98 (the Municipality of Luquillo), 99 (the Municipality of Fajardo), 100 (the Municipality of Culebra), 101 (the Municipality of Vieques) and 102 (the city districts Machos, Pueblo, Río Abajo and Sacos of the Municipality of Ceiba. *Final Decision of the Constitutional Board of Revision of Electoral, Senatorial and Representative Districts of April 3, 1972;* Article 5.008, *Electoral Law of Puerto Rico,* 16 L.P.R.A. Sec. 3208.

5. Right of the Electors

1) Under the Electoral Law, in force, the adjudication of a challenged ballot and which was duly answered supposes to resolve an attack to the legality and validity of the vote —total or partial—which, in turn supposes, to prove the certainty of the fundamental principles invoked for the recusation. It deals about an adversative process under the requirements of due process of law including the notification to the elector, summoning of the witnesses and defile of evaluation of the evidence. *Osvaldo Molina* v. *Gerineldo Barreto Pérez and others,* 80 J.T.S. 98.

2) As to the adjudication of the duly answered challenged ballots, we should distinguish between the adjucation of the vote from the point of view which is purely formal or of

accounting—in favour of for whom was the ballot voted—and the point of view which is substantive or of depth, that is if the ballot was illegally voted by an elector that does not meet the legal pertinent requirements; in virtue of such distinction, the adjudication in substance of the challenged ballot is an essentially different process than that of an ordinary and normal transaction followed during the electoral canvass that only refers to the adjudication in the formal sense. *Osvaldo Molina* v. *Gerineldo Barreto Pérez and others,* supra.

3) Urgent governmental interests that uphold the validity of the statutory premise that, as a general rule, every elector exercise the franchise in the poll or electoral unit of his precinct, in which he appears registered. *Partido Socialista Puertorriqueño and others* v. *Comisión Estatal de Elecciones and others*, 80 J.T.S. 92.

4) The constitutional right to vote should be interpreted liberally; such right to the franchise is essential to the democracy and it is justly strengthened by a liberal interpretation of its scope. *Partido Socialista Puertorriqueño and others* v. *Comisión Estatal de Elecciones and others,* supra.

5) A duly registered elector has in his favour a presumption that he is a qualified and an ideal elector. *Partido Socialista Puertorriqueño and others* v. *Comisión Estatal de Elecciones and others,* supra.

6. Annulment of a Vote

1) If after an election, it is shown that a challenged ballot was voted by a person or an elector who did not have a right to vote in it, the Commission will order the annulment of his vote, as well as, the rectification of the canvass. (Article 6.003 of the Electoral Law of Puerto Rico, 16 L.P.R.A. Sec. 3263).

7. Procedure

1) The administrative organisms are specially created with the purpose that they might operate without the inflexibility that generally characterizes the courts. *Martínez* v. *Tribunal Superior*, 83 D.P.R. 717 (1961).

2) An administrative process should not be full of formality. *Alonso García* v. *Comisión Industrial*, 102 D.P.R. 741 (1974).

3) They are of unavoidable application in the proceedings before a court, as well as to the procedures of administrative adjudication of the just and reasonable norms that have been formulated for the good of justice in order to diminish the rigor of the judicial proceeding that affects adversely the fundamental right so that a party may have his day in court someday. *J.R.T.* v. *Missy Mfg. Corp.* 99 D.P.R. 805 (1971).

4) The essence of the administrative process is its flexibility; this process should not be overloaded with the formal rigor that in the past characterize the judicial proceedings. *Board of Appeals about Constructions and Lotifications*, 79 J.T.S. 82.

5) The main objective of an administrative agency—groundwork of its existence as such—is that what is just prevail without the processal obstacles of courts of justice. *Martínez* v. *Tribunal Superior*, supra.

6) It is the purpose of the administrative to establish a just, practical and flexible system for the adjudication of law in the agencies of the Executive Branch. *P.R. Telephone Co.* v. *Tribunal Superior*, 102 D.P.R. 231 (1974).

7) The aim of the administrative agencies is to establish a system of adjudication which is just, practical and flexible, less expensive and less complicated, than the ordinary litigations. The administrative agencies should have faculties which are sufficiently broad in order to establish its

rules of procedures and the process of admission of evidence; the complicated procedures and the late remedies would ruin all the intention of the laws and of the organism created to defend the right to vote of the citizens. See as a way of analogy *Pérez Ríos* v. *Hull Dobbs and others*, 78 JTS 90.

8) The due process of law offers protection against the administrative arbitrariness but is not a rigid mold that deprives the administrative procedures from flexibility at all instances. *Rodríguez* v. *Tribunal Superior*, 904 D.P.R. 335 (1975).

9) The administrative organisms can take judicial knowledge of its own records related to previous, interrelated lawsuits, among the same parts. *J.R.T. v. Club Náutico*, 97 D.P.R. 386 (1969).

10) The mere fact that an adjudicatory authority has considered something out of the record does not invalidate its action, unless it is shown that such action has caused substantial prejudice. *J.R.T.* v. *Club Náutico*, 97 D.P.R. 386 (1969).

11) The essential part of the arguments in the administrative procedures is to offer to the opposing party an adequate opportunity to prepare itself. Att. *Southern Ins. Co.* v. *López Castro*, 86 D.P.R. 79 (1962).

12) So that an "adequate hearing" exists, the presentation of evidence is not required when the said evidence does not affect the matter that is going to be resolved. *Central Monserrate, Inc.* v. *Junta Azucarera*, 83 D.P.R. 109 (1961).

13) The requirement of notification of an administrative organism to the individual or directly concerned party stays fulfilled with the notification to the party, whether he has a lawyer or not. See by way of analogy *Caparra Country Club* v. *Junta de Planificación*, 74 DPR 74 (1952).

14) Valid Acts and Executories of the governmental institutions carried out in accordance with the law, produce

juridical effect no matter who could be the concerned parties of such institutions at a definite moment. *Morales* v. *Junta Examinadora de Ing.* 99 D.P.R. 84 (1970).

15) Once a procedure is impugned before this Board, if the party against whom the said procedure is directed does not deny the arguments of the same, the Board will be able to consider them as admitted, and in such virtue would make conclusions of fact and of law about the same. *Graficart* v. *J.R.T.*, 97 D.P.R. 473 (1969).

16) The doctrines of the Rules of Civil Procedure should be adopted by the administrative organisms when these principles propitiate a just solution. *Berríos* v. *Comisión de Minería*, 102 D.P.R. 228 (1974); *Martínez* v. *Tribunal Superior*, Supra.

17) The acceptance of public documents, proceedings or records is one of the exceptions of the general rule of acceptance of the evidence of reference. The term "public document" has various meanings, including the following: non-confidential documents to which the public may have access to and official documents prepared by public officials discharging a public duty. *Pueblo* v. *Millán*, 80 J.T.S. 74.

18) The due process of law does not allow that an order or sentence dictated in an administrative forum, the same as in a judicial one, would affect to whom is not a party in the process in which it was dictated. *Perez Ríos* v. *Hulls Dobbs and others*, 78 JTS 90.

19) The party that upholds the affirmation of a matter is the one called to offer the evidence to uphold it. *Ortiz* v. *Bermúdez*, 70 D.P.R. 707 (1949); *Vaquería Garrochales Inc. and/or others* v. *A.P.P.R.*, 106 D.P.R. 799 (1928). Our Supreme Court has extended the application of this norm to the administrative organisms. *South P.R. Sugar Corp.* v. *Junta Azucarera*, 89, D.P.R. 362 (1963).

20) It corresponds to the Electoral Review Board to determine, in the procedures at first instance before it and as

its own exclusive function, the credibility that the witnesses of one and the other parties would deserve. *Junta Relaciones Trabajo* v. *Simmons Int'l., LTD*, 78 D.P.R. 375 (1955).

21) The rules of evidence are not of strict application in the administrative forum. See *Rosedale Coal Co.* v. *Director of U.S. Bureau of Mines*, 247 F.2d 299; *Buchwalter* v. *Federal Trade Commission*, 235 F.2d 344; *Hunter* v. *Gronousky*, 234 F. Supp. 1010; *Wheatley* v. *Shields*, 292 F. Supp. 608; *Okon* v. *Roland*, 247 F. Supp. 743; *U.S.* v. *Bowrman*, 236 F. Supp. 548, confirmed in 358 F.2d 421; *Clearfield Cheese Co.* v. *U.S.* 308 F. Supp. 1072; *Fried* v. *U.S.* 212 F. Supp. 886. As to the acceptance of evidence of reference, it has been pleaded with obstinancy about the convenience of the idea that the general rule of exclusion, as fulfilled by the courts of justice, will not be applicable in the administrative forum. See Davis, *Hearsay in Administrative Hearings*, 32 Geo. Wash. L. Rev. 689 (1964).

Since a long time ago in Puerto Rico, this pragmatic and liberal approach has been applied. See *Cepeda* v. *Comisión Industrial*, 76 D.P.R. 801 (1954). The same as the administrative organism is authorized to adopt those norms of the Rules of Civil Procedure that propitiate the most just solution to the controversy to be discussed (*Berrios* v. *Comisión de Mineria*, supra), in an equal manner, without resorting to the conventional and original requirements of the courts of justice, adopting those norms of the Rules of Evidence, particularly the ones relative to the weight of the proof and credibility of the witnesses, that would facilitate the course of the administrative process, remembering always that the rules of evidence are not able to be changed into an obstacle to the knowledge of truth by exaggerated technicisms. *Muñiz* v. *Aetna Casualty and Surety Co.*, 38 D.P.R. 839 (1928).

22) The declaration of a not-contradicted witness about a determined fact, should deserve credit, unless his version

is not physically possible, improbable or that his conduct in the witness seat be made unworthy of credit. *Caballero* v. *González*, 53 D.P.R. 539 (1938); *Navarro* v. *Compañía Azucarera El Ejemplo*, 53 D.P.R. 726 (1938); *Pomales* v. *Sucn. Planellas*, 59 D.P.R. 372 (1941); *Pedraza* v. *González*, 66 D.P.R. 757 (1946); *Cintrón* v. *Cintrón*, 70 D.P.R. 770 (1950); *Biaggi* v. *Sucn. Esbri*, 71 D.P.R. 450 (1950); *Villaronga Com.* v. *Tribunal de Distrito*, 74 D.P.R. 331 (1953); *Alicea* v. *Sucn. F. Gil Rivera*, 87 D.P.R. 789 (1963); *Miranda Soto* v. *Mena Eró*, 80 JTS 17.

23) The litigators, in the courts of justice, as well as, in the administrative organisms, are not obligated to prove their cases with mathematical accuracy, through direct evidence. The law does not require such degree of evidence, that if the possibility of error is excluded an absolute moral, certainty or a degree of evidence that produces conviction with an unforeseen intention will be produced. See *Colón* v. *Shell Co.*, 55 D.P.R. 592 (1939); *Castro* v. *Payco*, Inc., 75 D.P.R. 63 (1953).

24) The direct evidence of a witness that deserves complete credit, is enough evidence for any point at issue, except when any other thing is disposed by law. *Pueblo* v. *Jaimán Torres*, 86 D.P.R. 700 (1962).

25) The mere fact that a party presents more witnesses than his opponent, does not imply that the preponderance of evidence will be on his behalf. Such prependerance could be established by a witness against a greater number that would declare the contrary. *Ballester* v. *Farm & Dairy Products, Inc.*, 58 D.P.R. 479 (1941). Preponderance of evidence does not mean the majority of witnesses that declare in a case, but an excess in the importance of the evidence once the depositions of the witnesses, the documentary evidence and all the deeds and circumstances that surround the transaction have been considered. *Irizarry* v. *Trujillo, Mercado and Co.*, 16 D.P.R. 20 (1910).

26) The maximum *falsus in uno, falsus in omnibus* do not apply in this jurisdiction. The whole deposition of a witness should not be rejected because of the mere fact that he does not say the truth concerning one or more topics. Pueblo v. Figueroa Castro, 102 D.P.R. 279 (1974).

27) A case is not resolved because of a simple detail, but with the weight of all the proof, nor could it be affirmed without a serious examination that a witness that incurs in contradiction counterfeits the truth voluntarily. *García* v. *Superior Court*, 86 D.P.R. 823 (1962).

• • • • • • • • • • •

[At this point 169 pages of the Board's opinion—dealing seriatum with the individual cases presented for decision and not yet translated from the Spanish—are omitted.]

• • • • • • • • • • •

CONCLUSIONS

By the fundamental principles, determination of facts and conclusions of law previously formulated in relation to all the cases before its consideration, this Board resolves as follows:

1. In relation to the case JR 80-279 the attacks to the legality of the votes casted by the electors Migdalia Sánchez Hernández, Iris Sánchez Hernádez, Fernando Pagán Rodríguez, José Montañez Robertó, Carlos Colmedo Martínez, Michael Ferry, Annie L. Pérez Ortiz, José González Fontánez, María Soto Sanes, Norma Soto Sanes, Carmen D. López Ramos, Gloria López, José Luis Castaño, Awilda Moringlane Encarnación, Luis Ramos Santiago, Carmen D. Pimentel, Juan H. Carrillo, Sonia Becerril, Carlos Rosado Santana, Ruth Rodríguez Diaz, Wanda Cotto Cantres, Lydia Cardona Lebrón, Nancy Maldonado, Jesusa Vizcarrondo, Lucia Avila, María del Carmen Elías e Ivis Raquel Cartaño, will be confirmed for a total of 27 votes.

Those whole and complete votes having been adjudicated on behalf of the Popular Democratic Party, should be discounted in conformity with the law from the Representative District Number Thirty-five (35) and its candidate Samuel Cepeda.

2. In relation to the case JR 80-281, the attacks to the legality of the votes casted by the electors Gloria M. Vázquez Quiñones, Juanita Santiago Meléndez and Prudencio Ramos Figueroa will be confirmed for a total of three (3) whole and complete votes in behalf of the New Progressive Party, the same will be discounted in conformity with the law from Representative District Number Thirty-five (35) and its candidate Osvaldo Molina, except in relation to the vote of the elector Gloria M. Vázquez Quiñones, which will be totally annuled.

3. In relation to the other cases (JR. 80-274, JR. 80-275, JR. 80-276, JR. 80-277, JR. 80-278, JR. 80-280, JR. 80-282, JR. 80-283, JR. 80-284 y JR. 80-285, this Board decided to so register it specifically when narrating or exposing the same.

ORDER

The State Commission of Elections is ordered to rectify the canvass relative to Representative District Thirty-five (35) in order to discount from the preliminary totals previously emitted the following votes:

(1) In relation to the New Progressive Party and its candidate Osvaldo Molina, two (2) votes should be discounted in conformity with what was resolved in the case JR 80-274, two (2) additional votes in compliance with what was resolved in the case JR 80-275 and three (3) votes in conformity with what was resolved in case JR 80-281 for a total of seven (7) votes. This way the preliminary sum total announced by the Commission of 22,926 votes should be adjusted to 22,918 votes on behalf of the New Progressive Party and its candidate Osvaldo Molina.

(2) In relation to the Popular Democratic Party and its candidate Samuel Cepeda, twenty-eight (28) votes should be discounted in conformance with what was resolved in case JR 80-281. This way the preliminary sum total announced by the Commission of 22,921 votes should be adjusted to 22,893 votes on behalf of the Popular Democratic Party and its candidate Samuel Cepeda.

It is ordered in addition that the State Commission of Elections do certify Mr. Osvaldo Molina as the winner of Representative District Thirty-five (35) once this Resolution becomes final and firm.

This be registered and notified.

Given in San Juan, Puerto Rico, on January 14, 1981.

ELECTORAL REVIEW BOARD

Roberto Schmidt Monge
President

Myrta Irizarry Ríos
Associated Member

*Benigno Dapena Pordán
Associated Member

NOTIFICATION:

I certify that on January 15, 1981, I notified in person with a copy of this Resolution and the Concurrent and Dissident Opinion of Mr. Benigno Dapena Yordán to:

1) José Andreu García, Esq.
403 Ponce de León Avenue
Stop 7, Puerta de Tierra
San Juan, Puerto Rico

2) Carlos Santos Correa, Esq.
Banco Popular Center, Suite 918
Hato Rey, Puerto Rico

---

* He dissents and concurs in a separate opinion.

3) Gerineldo Barreto Pérez
State Commission of Elections Administrator
114 San Agustín Street
Puerta de Tierra, San Juan, Puerto Rico

4) Ernesto L. Chiesa, Esq.
Secretary
Supreme Court of Puerto Rico
San Juan, Puerto Rico

5) Eugenio S. Belaval, Esq.
New Progressive Party's Electoral Commissioner
266 Ponce de León Ave.
Puerta de Tierra, San Juan, P.R.

6) Héctor Luis Acevedo, Esq.
Popular Democratic Party Electoral Commissioner
403 Ponce de León Ave.
Puerta de Tierra, San Juan, P.R.

7) David Noriega Rodríguez, Esq.
PIP Electoral Commissioner
963 Roosevelt Ave.
Puerto Nuevo, P.R.

8) Ludmilia Rivera Burgos, Esq.
PSP's Electoral Commissioner
1866 Ponce de León Ave. and Sagrado Corazón
Charneco Sector
Santurce, Puerto Rico

Lourdes T. de Quiñones
Secretary

APPENDIX C

IN THE SUPREME COURT OF PUERTO RICO

No. 0-81-27—Review

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA,
Appellants

v.

GERINELDO BARRETO PÉREZ, General Administrator of Elections, and OSVALDO MOLINA, *Appellees*

JUDGMENT

San Juan, Puerto Rico, June 23, 1981

In view of the grounds laid down in the foregoing opinion, the Electoral Riview Board's decision of January 14, 1981, as amended, is hereby reversed, and Popular Democratic Party candidate Mr. Samuel Cepeda is hereby declared Representative elect for Representative District No. 35. A total of 22,921 votes shall be adjudicated to Cepeda, against 22,912 adjudicated to New Progressive Party candidate Osvaldo Molina.

Mr. Justice Negrón García issued a concurrent opinion, and Mr. Justice Martín issued a dissenting opinion. Mr. Justice Dávila disqualified himself.

It was so agreed by the Court and certified by the clerk.

[SEAL]

ERNESTO L. CHIESA
Chief Clerk

APPENDIX D

IN THE SUPREME COURT OF PUERTO RICO

No. 0-81-27—Review

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Appellants*

v.

GERINELDO BARRETO PÉREZ, General Administrator of Elections, and OSVALDO MOLINA, *Appellees*

MOTION FOR RECONSIDERATION

TO THE HONORABLE SUPREME COURT:

Comes now Osvalda Molina, the appellee herein, in his own behalf and in behalf of the electors who supported him in the ballot, and of those whose votes were annulled by this Supreme Court through the judgment entered on June 23, 1981, represented by his undersigned attorneys and very respectfully prays this Honorable Court to reconsider the aforementioned Judgment.

I. Jurisdiction of This Honorable Supreme Court

The jurisdiction of this Supreme Court is based on Rule No. 45, on Motions for reconsideration, of the Rules of the Supreme Court of Puerto Rico. The judgment in this case was rendered on June 23, 1981. The present Motion for Reconsideration is filed within the "term of ten working days," as required by the aforesaid Rule No. 45.

II. Assignment of Errors Contained in the Judgment Rendered by the Honorable Court

A. The decision and judgment of the Honorable Supreme Court violates Art. II, Sec. 2 of the Constitution of the Commonwealth of Puerto Rico which safeguards the fundamental right to vote in its widest range of expression and

violates also the constitutional guarantees on due process and equal protection of the laws contained in Art. II, Sec. 7 of the Constitution of the Commonwealth of Puerto Rico, as well as the due process and the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States:

> 1. when it promulgates new substantive and procedural standards, whose application is "essential," and which affect the voting rights of the electors involved in this action and the right of a political party candidate who has been declared representative elect for Representative District No. 35, standards which should be applied when scrutinizing any attack of an elector's voting rights and when determining the domicile of an elector.
>
> 2. when it promulgates a new and stricter standard of proof denominated "clear, strong, and convincing evidence" standard, which should be applied when passing on evidence to annul a vote or when determining the domicile of an elector.
>
> 3. and when after combining all of this new electoral Law it goes on to apply these *New* rules or "controlling standards," "which . . . are the only ones compatible with the constitutional mandate,"[1] adjudicating each case—"each one of the forty cases brought before our consideration"[2]—based on a record which the Honorable Supreme Court found to be hastily produced, incomplete, devoid of evidence, and deficient, whose proceedings, which developed before the Review Board,

---

[1] "The standards we shall discuss herein, *and which we understand are the only ones compatible with the constitutional mandate* which guarantees 'the expression of the will of the people by means of equal, direct and secret universal suffrage,' free from coercion, were outlined in the introductory paragraphs of this opinion." Opinion, p. 17. (Underscore supplied.)

[2] Opinion, pp. 123-124. (Underscore supplied.)

were qualified by the Honorable Supreme Court as incorrect, including "deficient evidence," "weak evidence," unsatisfactory, defective, with incomplete service of process,[3] and unfinished.[4]

4. The Honorable Supreme Court thus deprives the petitioner in this Motion for Reconsideration of his rights as a qualified candidate elect and of the opportunity to revindicate his nomination in the light of all the new controlling standards established by the Judgment of June 23, 1981, it also deprives the affected electors of their fundamental right to defend their vote under the new controlling standards, right which is a clear and unquestionable requirement of the right to vote.

B. The Honorable Supreme Court of Puerto Rico erred in rejecting the validity of the challenges made on the back of the ballot where the contestant did not enter his signature at the bottom of the note where he stated the ground for the challenge.

C. The Honorable Supreme Court of Puerto Rico erred in holding that a transfer petition is equivalent to a petition for registration.

D. The Honorable Supreme Court of Puerto Rico erred in validating unprocessed or invalid transfers.

---

[3] "minimal steps which do not comply with the due process of law." Opinion, p. 103.

[4] "The resolution of the Board is based on restrictive standards on the exercise of suffrage which, as we have already pointed out, are not adequate. We have also seen that, in some cases, these standards were not uniformly applied. However, we recognize that the Board had to work under pressure, at a time of great tension, under an irregular and burdensome work schedule, in order to turn out, at the earliest possible date, a decision on the final result of Representative District No. 35." Opinion, p. 124.

E. The Honorable Supreme Court of Puerto Rico erred in validating challenges which do not strictly comply with the statutory requirements of art. 5.034 of Act No. 4 of December 20, 1977, as amended.

III. Argument of the Errors Assigned

A. *First assignment of error*

A careful reading of the opinion of the Honorable Court in this case clearly shows that a framework of new standards was established,[5] whose applications is considered

---

[5] We must outline—later on we shall discuss them *in extenso*—the standards that should be applied when scrutinizing any challenge to the voting rights of an elector. Said standards must be framed within the principle that the right to vote is the most precious prerogative of the people because it is through the vote that the people exercise their sovereign power and express their will. Bearing this fundamental principle in mind, we deem that the application of the following rules is essential:

"(1) the validity of the vote cast by an elector is presumed;

(2) whoever challenges a vote has the burden of proving the facts under which he stands;

(3) the evidence to annul a vote must be clear, strong, and convincing;

(4) all challenges must strictly comply with the statutory requirements;

(5) the challenged elector shall be given ample opportunity to appear and defend the validity of his vote;

(6) when passing on a challenge none other than the grounds raised therein shall be considered;

(7) a vote shall not be annulled, nor its validity questioned, for errors for which the elector is not responsible;

(8) the domicile of an elector shall be determined pursuant to the rules laid down in the Electoral Law, always bearing in mind his *animus manendi* or his intention to remain there;

(9) the validity of an electoral ballot shall be upheld provided that the voter's intention be reasonably determined; and

(10) no physical handicap of an elector shall serve as a

"essential"[6] in furtherance of the "fundamental principle"[7] "that the right to vote is the most precious prerogative of

---

valid ground to deprive him of his right to vote." Opinion, pp. 2 and 3.

"Once these factors and grounds have been considered, *the approach* to the validity of a vote cast at a certain place, from the point of view of the domicile of the elector, *should be necessarily liberal*. Based on these considerations *we conclude that the following criteria should have been applied and shall prevail for the purpose of determining the domicile of an elector:*

(1) That it is a mixed question of law and of fact;

(2) That the elector's place of residence is only one of the factors to be considered;

(3) That the most important factor is the elector's intention always bearing in mind that the intention to remain in a place (*animus manendi*) is one thing and the purpose of making a domicile at a different place is another thing;

(4) That the temporary absence for work, study, illness of self or family reasons, does not deprive an elector of his domicile;

(5) That the elector must not necessarily be present at all times at his place of domicile in order to retain it;

(6) That having business, employment, social or economic relations, post office box, telephone number, or utility accounts at a certain place are factors to be considered but do not in themselves determine that a domicile has been acquired in that place;

(7) That he who alleges a change of domicile has the burden of proof;

(8) That there is a presumption in favor of the original domicile and place where the elector votes, and he who alleges that there has been a change of domicile must show it through clear, strong, and convincing evidence not affected by exclusionary rules." Opinion, pp. 66-67. (Underscore supplied.)

[6] Opinion, p. 2.

[7] *Ibid.*

the people because it is through the vote that the people exercise their sovereign power and express their will."[8]

There is no doubt that we are in the presence of a new electoral Law, which did not exist before this Opinion and Judgment was rendered on June 23, 1981.[9]

---

[8] *Ibid.*

[9] A detailed study of all the electoral cases and Resolutions decided by this Honorable Court in the light of the Electoral Law, Act No. 4 of December 20, 1977, convinces us of the accuracy of this statement.

1. *P.P.D. y P.S.P.* v. *Barreto, Administrador*, 80-619—80-621, decided November 14, 1980.

2. *P.S.P.* v. *Administrador*, Resolution of November 21, 1980.

3. *P.S.P.* v. *Administrador*, 80-635, decided on December 2, 1980.

4. *P.P.D.* v. *Administrador; P.N.P., Interventor*, 80-646, decided December 2, 1980.

5. *P.P.D.* v. *Ferrá y Administrador*, 80-658, decided December 2, 1980.

6. *Ferre y Ramos et al.* v. *P.S.P.*, 80-647; *P.P.D.* v. *Administrador*, 80-647, decided December 2, 1980.

7. *López* v. *Administrador*, M.C.-80-66, decided December 15, 1980.

8. *P.P.D.* v. *Administrador*, 80-619, Resolution of December 18, 1980.

9. *P.P.D.* v. *Administrador*, 80-619, Resolution of December 18, 1980.

10. *Molina* v. *Barreto y P.P.D. y Cepeda*, 80-713, Resolution of December 23, 1980, and decision of December 24, 1980.

11. *Molina* v. *Barreto y P.P.D. y Cepeda*, 80-713, Resolution of December 30, 1980.

12. *Díaz* v. *Bernazard*, 80-75, Resolution of December 31, 1980.

13. *P.S.P. y P.P.D.* v. *P.N.P.*, 80-635; 80-645; 80-646; and 80-664, Per Curiam of December 26, 1980.

14. *Zayas* v. *Rodríguez*, O-81-3 (J.R. 80-273) decided on January 9, 1981.

We do not question the Honorable Supreme Court's power to be the final interpreter of our Constitution,[10] but in the application of the Law, thus distilled, we contend that this Honorable Court cannot injure the fundamental rights of the candidate elect and of the electors who voted for him.[11]

---

15. *Rodríguez* v. *Martínez*, 81-3 (J.R. 80-288), decided January 9, 1981.

16. *Rivera* v. *Padilla*, 81-7 (J.R. 81-1), decided January 9, 1981.

17. *Díaz* v. *Díaz*, 81-3 (J.R. 80-290), decided January 9, 1981.

18. *Esteves* v. *Bernazard*, decided January 9, 1981.

19. *P.P.D.* v. *Gob. Romero y Administrador*, decided May 12, 1981.

[10] As the keepers and chief custodians of the rights guaranteed by the Constitution of the Commonwealth of Puerto Rico. *P.P.D. y P.S.P.* v. *Barreto*, decided November 14, 1980, and *Molina* v. *Barreto y P.P.D. y Cepeda*, decided December 24, 1980. *Santa Aponte* v. *Ferré Aguayo*, 105 D.P.R. 670, 671 (1977); *Santa Aponte* v. *Sec. del Senado*, 105 D.P.R. 750, 759 (1977); *P.S.P.* v. *E.L.A.*, 107 D.P.R. 590, 595-596 (1978). See Brennan, W., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

[11] It is surprisingly ironic that the practical result of this Opinion and Judgment is that of depriving a candidate—twice declared elect by the administrative agencies having primary jurisdiction in electoral disputes—and the voters who supported him, of the fundamental rights regarding the *vote*. This becomes even more critical in those cases where the application of this new electoral Law entailed the annulment of their votes without giving the electors the opportunity to become acquainted with the new standards and to bring evidence in the light of the new requirements at a hearing before the Review Board where their constitutional rights to due process and equal protection would be guaranteed. *Cf. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063 (1980); Saphire, *Specifying Due Process Values; Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111 (1978), and Fiss,

Is the result of this Opinion and Judgment consonant with the basic philosophy giving form to the notions of fundamental justice, fair treatment, and equity which are simply and solely the postulates upon which the due process and equal protection guarantees within the set of values of the Constitutions of the Commonwealth of Puerto Rico and of the United States are based?[12]

We are in the presence of fundamental rights in the hierarchy of substantive values in a democratic system such as that prevailing in our society: the right to vote, the right of association for the advancement of political beliefs, the right to pursue public office, and the access to activities closely related to the exercise of suffrage. All these rights are interdependent.

The due process and equal protection clauses of the Constitution of the United States guaratnee the citizen's right to pursue public office,[13] to participate in the management of government as conceived in all its growing magnitude.

The right to pursue public office is as fundamental as the right to vote[14] and the right to association for the

---

The Supreme Court 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979).

[12] See, *e.g.*, Michelman, *Formal and Associational Aims of Procedural Due Process*, in Due Process, Nemos XVIII 126, (J. Pennock & J. Chapman eds. 1977).

[13] See *Lubin* v. *Panish*, 415 U.S. 709, 716-718 (1973); *Bullock* v. *Carter*, 405 U.S. 134, 143-144 (1972), and *Williams* v. *Rhodes*, 393 U.S. 29, 32, 36 (1968).

[14] See *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184-186, 99 S. Ct. 983, 990 (1979); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Harper* v. *Vir-*

advancement of political beliefs.[15]

These protected fundamental rights are closely linked. They are joined in constant interaction in the multiple manifestations they assume in the political arena.[16] A de-

---

ginia Board of Elections, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). See also, *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *American Party of Texas* v. *White*, 415 U.S. 767, 795 reh-denied, 416 U.S. 1000 (1974); *Storer* v. *Brown*, 415 U.S. 724, 729-730 (1973); *Lubin* v. *Panish*, 415 U.S. 709, 713 (1973); *Bullock* v. *Carter*, 405 U.S. 134, 142-143 (1972); *Moore* v. *Ogilvie*, 394 U.S. 814, 818 (1969), and *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968).

[15] *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184-186, 99 S. Ct. 983, 990 (1979); *American Party of Texas* v. *White*, 415 U.S. 767, 771, reh. denied 416 U.S. 1000 (1974); *Lubin* v. *Panish*, 415 U.S. 709, 713-716 (1974); *Storer* v. *Brown*, 415 U.S. 724, 729 (1973); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Williams* v. *Rhodes*, 393 U.S. 29, 30 (1968).

[16] See *Lubin* v. *Panish*, 415 U.S. 709, 716 (1973) (right to vote and the right of the political party or of the candidate to have access to the ballot); *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972) (rights of voters and rights of candidates); *Williams* v. *Rhodes*, 393 U.S. 29, 30-31 (1968) (the right to association for the advancement of political beliefs, and the right to vote are "different, although overlapping"). The Honorable Supreme Court of the United States has clearly indicated that the right to vote, the right to association for the advancement of political beliefs, the right to pursue public office, the right to have access to the ballot and to appear thereon, are interdependent interests.

To this effect, the Honorable Supreme Court of the United States reaffirmed:

> "The interests involved are not merely those of parties or individual candidates. The voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. *The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters.*" *Lubin* v. *Panish*, 415 U.S. 709, 716 (1973). (Underscore supplied.)

tailed analysis of the United States Supreme Court case law dealing with the right to pursue public office, as well as of the decisions dealing with the fundamental right to vote, shows that the former requires that the strict judicial scrutiny standard be thoroughly applied to the state's action.[17] Certainly, it is a well-established principle that once the state[18] creates, implements, and develops an electoral process,[18A] the Fourteenth Amendment to the Constitution[19] requires that any kind of discrimination be strictly analyzed in the light of the principles laid down in *Kramer* v. *Union Free School District*[20] and its progeny.

---

[17] *Illinois State Board of Elections* v. *Socialist Workers Party*, 400 U.S. 173, 184-186 (1979); *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *American Party of Texas* v. *White*, 415 U.S. 767 (1964); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Lubin* v. *Panish*, 415 U.S. 709 (1974), and *Bullock* v. *Carter*, 405 U.S. 134 (1972).

[18] There is no doubt that Puerto Rico is considered a state in cases where what is at stake is the fundamental right to vote, the right to association for the advancement of political beliefs, and the right to pursue public office. See *Examining Board* v. *Flores Otero*, 426 U.S. 572, 599-601 (1976); *Ortiz Angleró et al.* v. *Barreto et al.*, decided June 24, 1980.

[18A] An electoral campaign is one of the most effective means for the dissemination of ideas in a democratic society. It also constitutes a means to attain the governmental management unchained by the fundamental right to vote. See Bickel, H., *Reform and Continuity* (1971); and *La Nueva Constitución de Puerto Rico*, Esc. Administración Pública, Universidad de Puerto Rico (1950-51).

[19] In Puerto Rico, the source of this constitutional right would be either the Fifth or the Fourteenth Amendment. *Calero Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-669, n. 5 (1974).

[20] 395 U.S. 621 (1969).

In *Kramer*, the Honorable Supreme Court clearly upheld the principle that the standard of review under the equal protection clause is the strict judicial scrutiny or strict judicial control for-

The fundamental right to vote, the right of association for the advancement of political goals, and the right to pursue public office [21] are indisputably, in a society of laws like ours, concomitant with the qualified elector's right to an effective vote and the candidate's right that the votes cast for him be also effective. The electors, as well as the candidates, have a constitutionally valid expectation [22] that their votes will not be diluted, challenged, or annulled under any procedure which is not strictly harmonious with the constitutional guarantees of due process and equal protection.

That is, that due process and equal protection requirements under the Constitution of the Commonwealth and under the United States Constitution [23] are necessarily ap-

---

mula, which should be applied to state cases dealing with discrimination or violation of the electoral franchise.

In *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184-186 (1979), the Honorable Supreme Court clearly applied the strict judicial scrutiny standard to a case on access to the ballot and on a candidate's and political party's right to a place thereon.

[21] See notes 13, 14, and 15, *supra*.

[22] *Cf.* Paust, *The Concept of Norm: Toward a Better Understanding of Content Authority and Constitutional Choice*, 53 Temple L. Q. 226, No. 2 (1980).

[23] In *Ortiz Angleró* v. *Gerineldo Barreto Pérez y otros*, decided June 24, 1980, the Honorable Supreme Court of Puerto Rico expressly stated:

> "Aside from the fact that the *equal protection and due process clauses of the United States Constitution apply to Puerto Rico and determine* (just as it happens in the states) *the minimum content of the equivalent clauses of the Commonwealth Constitution, Pueblo* v. *Dolce*, 105 D.P.R. 422 (1976), the latter expressly recognizes the right to 'equal, direct, and secret universal suffrage. . . .' Art. II, Sec. 2, of the Constitution of Puerto Rico. The Preamble of our Con-

plicable, in all their ample manifestation, both at pre and post-election day stages. This extension of the constitutional protective cloak stems clearly and unquestionable from the fundamental right to vote. Doubtlessly, each elector and each candidate whose vote, or vote cast in his favor, is challenged—which constitutes an attack on the legality and validity of the vote—as well as those electors whose votes may be diluted or made ineffective by annulment,[24] are covered by the minimal guarantees of due process and equal protection. Would these fundamental rights otherwise become concepts devoid of content, empty containers, which would be nothing but mere ritualistic phrases whose final result would thwart their true purpose? Don't these fundamental rights—to vote, of association for the advancement of political goals, to pursue public office (whether or not part of a political machinery)—constitute "the cornerstone of our republican form of government?"[25]

---

stitution emphasizes the importance of democracy for the life of the Puerto Rican community and the fundamental nature of the vote for the existence of that democracy. The Constitutional Convention debates emphasized the essential nature of the vote." (Underscore supplied.)

[24] In *Reynolds* v. *Sims*, 377 U.S. 533, 554-555 (1964), the United States Supreme Court stated:

> "History has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

[25] *McDougall* v. *Green*, 335 U.S. 281, 288 (1948) (Douglas, J., dissenting).

The United States Supreme Court case law is full of references which tend to show that the democratic society has a compelling

In the instant case, this Honorable Court has laid down new substantive and procedural standards, also promulgating a new and more stringent standard of proof it calls "clear, strong, and convincing evidence" standard—analytical standard which is not defined by the Court or by our present Law—[26] and goes on to apply this new Law in the light of a record it has found to be unsatisfactory. We maintain that in doing so, this Honorable Court deprives both the candidate elect and the electors who supported him and whose votes were annulled by this Honorable Court of a plenary adversary proceeding surrounded by the mini-

---

interest in guaranteeing the purity of the electoral process. See *e.g., Powell* v. *McCormack*, 395 U.S. 486, 547 (1969): "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them,' 2 Elliot Debates 257." See also *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964):

> "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

[26] The Honorable Supreme Court places it midway between the preponderance of evidence standard and that of a reasonable doubt. But this position sheds no light on it.

Does this new standard require a degree of persuasion or certainty almost similar to that used in criminal cases for determining which facts have been established? Is it not also true that when the requirements of a standard of proof are increased, a greater degree of certainty would then be required of the trier of the facts? With due respect, is it effective, in the light of the record which in this case the Hon. Supreme Court has found to be incorrect and incomplete?

It is evident that, when considering the standard of proof when passing on the cases before it, the Electoral Review Board based its conclusion on the civil nature of its proceedings, which are contemplated by the Electoral Law. *Cf. Dee* v. *Delaware*, 67 L. Ed. 2d 312 (1981). See the 1979 Rules of Evidence, Rule No. 10.

mal guarantees of due process and equal protection of the laws. The minimal guarantees that should be offered are the right to be advised on the new controlling standards established in this Opinion and Judgment, the right to a hearing, the right to be heard, to summon witnesses, to bring evidence in the light of the requirements of the new standard of proof, presentation and weighing of the evidence.[27]

The principles laid down in *Griffin* v. *Burns*, 570 F. 1065 (1st Circuit 1979), *Williams* v. *Sclafani*, 444 F. Supp. 906 (S.D.N.Y.) affirmed mem. sub. nom. *Williams* v. *Vélez*, 580 F.2d 1046 (2d Cir. 1978), and *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), are applicable to the situation present in this case.

These cases show that due process and equal protection requirements guarantee the rights of the candidate elect as well as those of the electors.

In *Williams*, the Federal Court ruled:[28]

---

[27] See *e.g.*, *Molina* v. *Barreto y P.P.D. y Cepeda*, decided December 24, 1980, opinion which, with due respect, we deem should have been the means for transmitting to the Review Board and to the candidates and voters, all the controlling standards which this Honorable Court now establishes and applies. In the aforementioned case the candidates, the voters, and the Review Board are advised—please note that this case, decided on December 24, 1980, is part of the affected candidates' and electors' pilgrimage to the Hon. Supreme Court—of the difference and conceptualization between the substantive adjudication or adjudication on the merits, of a challenged ballot, and the adjudication of the ballot which is part of the normal and ordinary procedure followed during the electoral canvass. Moreover, this Court advised the candidates, the electors, and the Electoral Review Board on the minimal guarantees of due process required by the plenary adjudication.

[28] *Williams* v. *Sclafani*, 444 F. Supp. 906, 911 (S.D.N.Y.) (1978); affirmed mem. sub. nom. *Williams* v. *Vélez*, 580 F.2d 1046 (2d Cir. 1978).

> *Thus, the right to appear on the ballot is integral to the right to vote and must be measured by the same test of constitutionality. See Williams* v. *Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968). *Candidates have standing to assert this right.* See *Smith* v. *Cherry, supra*, and *Briscoe* v. *Kusper, supra* (implied in both cases). (Underscore supplied.)

The essence of these cases and, therefore, the electors' and the candidate's ground to make the constitutional claim we make herein is the fact that state authorities[29] applied the new Law retroactively in order to annul acts and actions already considered under the present Law, without previous notice of the new rules and controlling standards.

This Honorable Supreme Court has incurred in a violation of the Constitution similar to those incurred by state authorities in *Griffin, Williams*, and *Briscoe, supra*.

---

[29] It does not matter that the action taken had stemmed from the executive, legislative or judicial branch—as it is, in this case, the decision of the Honorable Supreme Court of Puerto Rico—it is a state action. See *Shelley* v. *Kramer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), where the United States Supreme Court decided:

> "That the action of state courts and judicial officers in their official capacity is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by the decisions of this Court."

Cf. Mitchum v. *Foster*, 407 U.S. 225, 92 St. Ct. 2151, 31 L. Ed. 2d 705 (1977), where the Court concluded that the express purpose of the section of the Federal Code, 42 U.S.C. 1983, is to vest the Federal Court with power to protect the federal rights of the American people from unconstitutional actions made under the pretense of the state's rights. "Even when such action is or comes from the Executive, Legislative, or Judicial Power." *Ibid.*, 407 U.S. 225, 242.

We contend that this Honorable Supreme Court should recognize to the affected candidate and electors the constitutional protections and safeguards to which they are entitled, and should give them the opportunity to defend their fundamental right to vote under the new Law created in this case. This claim is based on a clear and unquestionable requirement of the fundamental right to vote.

B. *Second Assignment of Error*

The Supreme Court erred in rejecting the validity of the challenges made on the back of the ballot where the contestant did not enter his signature under the note stating the ground for the challenge.

It is a constitutional principle that an elector is entitled to have his vote counted, as well as not to have his vote diluted by allowing that another elector's illegal vote be counted. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). To this end, the law authorizes the electors to challenge the votes of other electors if they have well-founded reasons to believe that they are illegal based on the reasons provided by law. It is clear that this right to challenge protects the right to the free exercise of the vote preventing the dilution of the same.

We very respectfully deem that the Supreme Court of Puerto Rico erred in comparing the solemnity required for holographic wills with the provisions of the Electoral Law regarding the signature of the contestant.[30]

The Supreme Court annulled the challenges made on the back of the ballot where the contestant did not enter his signature at the bottom of the note where he explains the grounds for the challenge. In most of these challenges the challenged elector has been identified, and the contestant has identified himself, and if the contestant has signed on the same side of the paper but not at the end of the

---

[30] Article 637, Civil Code of 1930, 31 L.P.R.A. § 2161.

note where he states the ground for the challenge, why is the challenge automatically invalidated?

To this effect, we echo the words of Justice Martín in his dissenting opinion:

> "The ballots rejected because of the absence of the contestant's signature essentially state the following: 'I, John Doe, challenge voter Richard Roe, because he does not reside in precinct X.' Even though the name of the contestant is not at the foot of the note including the challenge, it is in his own handwriting and under his name and responsibility that he states the reason for the challenge. Is it necessary that he signs his name once more to reaffirm that what he stated is true? We understand that the oversight of not having signed the challenge is due to the fact that the printed form that was originally required by law to be attached to the ballot, and which contained the blank spaces that served as guidelines for the contestant in the challenging process, was discarded by a subsequent amendment, that only required the Administrator to send to each polling place 'a sample challenged ballot *to show* the Polling Place Board how to fill out a challenge. (Underscore supplied.) Act No. 4, December 20, 1977, as amended by Act No. 3 September 8, 1980. Aside from this sample whose aim is *to show* the Board, the law does not contain any final provision to clear up the form requirement, and neither is it contained in the Regulations of the Commonwealth Election Commission, adopted to implement the Electoral Law. Approved on October 1, 1980. It was thus incumbent upon the Polling Place Board to guide and supervise the challenge process so that it could be effective. The fault of the Polling Place in failing to warn the contestant that, besides writing down his name, he should sign the challenge at the bottom of the same, should not annul the right of an elector to challenge an-

other elector in order to protect the dilution of his vote and thus his right of suffrage.

"The *Diccionario Enciclopédico de Derecho Usual* divides the concept of 'signature' into what it considers its two components, to wit: (1) its material expression and (2) its value. Insofar as its material expression is concerned, Professor Lessona, professor of Civil Procedure in the University of Siena, states: 'that *signatures* have been monographically dealt with, states that it has not been defined by law, a laudable situation that adjusts itself well to the antiformalist spirit of modern Law.' Lessona also states that '[*w*]*hat the law requires is the expression of the person's identity and of his handwriting;* in which case the judge shall verify the same.' (Underscore supplied.) Insofar as the signature's value, the aforecited dictionary states that '[T]he signature confirms the appearance of the person and the conformity with the facts and statements subscribed therein, except if it is obtained by surprise, fraud or violence.' III *Diccionario Enciclopédico de Derecho Usual*, 14th Edition, Editorial Heliasta, 1970.

"*After taking a look at the meaning of what constitutes a signature, as defined in the prestigious work of the author cited above, one is obliged to conclude that the contestant, having handwritten his name, and having expressed his conformity with the facts and statements voluntarily subscribed, convinced the challenged voter, in each case, of the seriousness of his action, motivating thus the latter's denial of the same.* A better demonstration of the efficiency of the contestant's action is hard to find. If the challenged elector had any doubts that the contestant was not attempting to challenge him one should suppose that he would not have answered the same. One should presume that in said circumstances the reciprocal actions of both the

contestant and the challenged voter are valid. It is significant to note that both the Commission and the Board accepted the challenges as valid, even when they were not signed by the contestant at the close of the statement, presumably considering the contestant's affirmation, in his handwriting, and with his name also handwritten, as complying with the signature requirements of the law. One should note that the Board considered the nine cases involved in the dispute on their merits without the technicality of the signature being an obstacle." Dissenting opinion of Mr. Justice Martin June 23, 1981. (Underscore supplied.)

C and D. *Third and Fourth Assignments of Error*

The Honorable Supreme Court of Puerto Rico erred in holding that a transfer petition is equivalent to a petition for registration.

The Honorable Supreme Court of Puerto Rico erred in validating transfers which could not be processed or which were invalid.

The transfer is a requirement as valid and important as the registration. In fact, the lawmaker placed said requirement on the same footing and under the same chapter of the act.[31] Whoever is not registered cannot vote in Puerto Rico. Whoever moves and does not get a transfer may vote for the national candidates but not for the local candidates of his jurisdiction. A person does not become an elector through a petition for registration which cannot be processed because it is incorrect or incomplete. This being the case, a transfer petition which cannot be processed because it is incorrect or incomplete does not turn a person into a transferred elector and, hence, his vote for the local jurisdiction is null. How can we conclude, then,

---

[31] Articles 2.014 and 2.022 of Act No. 4 of December 20, 1977, as amended, 16 L.P.R.A. §§ 3064 and 3072.

that a transfer petition is equivalent to a petition for registration?

The Supreme Court validates a transfer petition as if it were a registration.[32]

The alleged transfer cases are not in themselves cases involving the application of transfer rules. They are cases where there was no valid transfer or one which could be processed. These transfers petitions were incomplete, incorrect, confusing, reason why they could not be processed, and invalid. There were no transfers in these cases. What we find is the elector's unsuccessful attempt to make a transfer which was frustrated because the transfer petition was incorrectly filled.

The Supreme Court cannot expect the Commonwealth Election Commission to process invalid, incomplete, or incorrect transfer petitions.[33] These petitions were null. The Commission's agreements regarding transfers always refer to transfer petitions which are valid, and complete and which could be processed. The elector must place the public agency in a position where it can process his transfer petition. If he omits or confuses fundamental data in his petition, he should abide by whatever consequences this may have. The elector cannot remain idle waiting for the State, which was about to hold an electoral event where approximately one million six hundred thousand electors participated, to correct the information he himself furnished as if he were the only elector participating in said event. Electors are adult people. They also have at their disposal agencies whose services are free and which could help them in their administrative transactions. Among those agencies are the very Commission, the Review Board, the Political Parties and groups, the news media, etc. . . . But the elector can-

---

[32] Supreme Court of Puerto Rico, opinion of June 23, 1981, p. 48.

[33] Supreme Court of Puerto Rico, opinion of June 23, 1981, p. 33-50.

not have utopian expectations of reality. He is expected to make a reasonable effort to check if there is any problem with his registration, or if his petition is correct. He is also expected to be diligent and to check, close to election day, whether the transfer petition he filled was processed, and, if it was not, why. To this effect, and as a remedy in problem cases, the Commission, adopting a liberal attitude, established electoral Information Centers, with permanent computer terminals, which operating during the last month before election day from 8:00 a.m. to midnight. The Electoral Review Board, the Commonwealth Election Commission, and the Local Commissions were constituted in permanent session, and the Electors Inclusion Procedure we mentioned above was designed and implemented. This procedure was amply publicized in the media, and all electors were strongly advised to check their names on the lists. They were acquainted with and instructed on the Electors Inclusion Procedure. During the last six months before the election, the press and other media constantly advised the electors that there could be errors on the lists. Political parties spent a lot of time orienting their officers and the electors, and checking them up. In view of this, what diligence was shown by the electors in controversy, besides that of filing an incomplete transfer petition which could not be processed, a few months before the election.

E. *Fifth Assignment of Error*

The Honorable Supreme Court erred in validating challenges which do not comply strictly with the provisions of art. 5.034 of Act No. 4 of December 20, 1977, as amended.

According to the fourth standard of those applied by this Honorable Court when passing on Representative District No. 35, every challenge must strictly comply with the statutory requirements.

Article 5.034 of Act. No. 4 of December 20, 1977, as amended, provides:

> Any voter or inspector who has good reason to believe that a voter who has come to vote in doing so illegally, or has already voted in another polling place or precinct, may challenge his vote for the reason that made it illegal, pursuant to the provisions of this Act, but such challenge shall not prevent the person from voting. The ballot of every voter whose vote is challenged must be marked with the word "challenged" on the reverse, *with a brief statement as to the reason for the challenge, signed by the person of the polling place inspector who issues the challenge, the elector's identification card number of the person affected, the municipality, precinct and number of the polling place.* If the challenged voter denies the challenge he must sign the challenged ballot on the reverse, under oath, but if he does not deny it, his vote shall not be counted and shall be null and void. The Administrator shall send to each Polling Place a sample Challenged Ballot to show the Polling Place Board how to fill out a challenge. (Underscore supplied.)

In the cases of Nellie Cortés Mediná, Roberto Pérez and Maritza Pérez Cortés, the Supreme Court passed on the merits of the challenge, although the challenge did not comply with the provisions of art. 5.034. The challenged electors were not identified, nor was their electoral identification card number included.

Pursuant to the rule established by the very Supreme Court of Puerto Rico, said challenges are not valid because they do not strictly comply with the provisions of art. 5.034. We deem that each of these votes should be counted for Mr. Osvaldo Molina as representative for Representative District No. 35.

If the Supreme Court of Puerto Rico adopts general standards of adjudication, it must comply with the same in a uniform manner. When it invalidated the vote cast by each of these three electors mentioned above, the Supreme Court of Puerto Rico violated these electors' constitutional rights to the equal protection of the laws by failing to apply the adjudicative standards in a uniform manner. See Exhibits I, II, and III.

WHEREFORE, we pray this Honorable Court:

a. To grant this Motion for Reconsideration.

b. To acknowledge to the affected candidate and electors the constitutional protections and safeguards contained in Art. II, Secs. 2 and 7 of the Constitution of the Commonwealth of Puerto Rico, and in the Fifth and Fourteenth Amendments to the Constitution of the United States, and allow them to make an adequate defense of their fundamental right to vote under the new Law created by this decision. We pray that an oral hearing before this Honorable Supreme Court of Puerto Rico be granted to us.

c. To reverse the Judgment entered by this Honorable Court on June 23, 1981.

d. Any other pronouncement as Law may warrant.

RESPECTFULLY SUBMITTED:

In San Juan, Puerto Rico, this 7th day of July 1981.

(Sgd.)
ANTONIO CORDOVA GONZALEZ
Attorney for appellee
G.P.O. Box 2446
San Juan, Puerto Rico 00936

IV. Service

I CERTIFY: That I have served a true and exact copy of this Motion on Atty. Guillermo Mojica Maldonado, Atty. Miguel Pagán, and Atty. Héctor M. Laffitte at their known legal addresses, this 7th day of July 1981.

(Sgd.)
ANTONIO CORDOVA GONZALEZ

APPENDIX E

IN THE SUPREME COURT OF PUERTO RICO

No. 0-81-27
REVISION

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Appellants*

vs.

GERINELDO BARRETTO PEREZ, General Administrator of Elections and OSVALDO MOLINA, *Appellees*

RESOLUTION

San Juan, Puerto Rico, July 28, 1981

The motion of reconsideration, is denied.

The Court agreed to it and the Secretary certifies it. The Associated Judge, Mr. Negrón García agrees with the denial because of the fundamental principles explained in his concurrent opinion of June 23, 1981. The Associated Judge, Mr. Martin, expresses that he would have received favourably the motion for reconsideration because of the same fundamental principles expressed in his dissident opinion of that same date. The Judge President, Mr. Trías Monge did not intervene and Associated Judge Dávila, inhibited.

Ernesto L. Chiesa
Secretary

APPENDIX F

Excerpts From The Puerto Rico Electoral Law, Act Of December 20, 1977, No. 4, *As Amended* To November 4, 1980 (16 L.P.R.A. § 3001 *et seq.*)

TITLE 16. ELECTION AND REGISTRATION

* * *

Subtitle 5. Electoral Law
Chapter 301. General Provisions; Electoral Bodies

* * *

§ 3003. Definitions

For the purposes of this subtitle the following terms or phrases shall have the meaning expressed hereinafter:

. . .

(3) "Administrator" shall mean the General Administrator of Elections.

. . .

(9) "Commission" shall mean the Commonwealth Election Commission hereby created for the purpose of organizing and supervising all electoral processes.

. . .

(16) "Elector" shall mean every person registered to vote in Puerto Rico under the provisions of this subtitle.

(17) "Board" shall mean the Electoral Review Board which is hereby created.

. . .

(19) "Poll Board" shall mean the electoral body at polling place level, composed of representatives of the various political parties, which represents the Commonwealth Election Commission in its assigned voting place on election day.

. . .

(30) "Challenged Ballot" shall mean the ballot on which the word "Challenged" is written on the back, having been subject to the challenge procedure provided hereunder.

. . .

§ 3004. Commonwealth Election Commission

The Commonwealth Election Commission is hereby created, composed of a General Administrator who shall be its Chairman, and an Electoral Commissioner for each of the principal political parties, parties by petition or coalesced parties.

. . .

§ 3005. General Administrator of Elections

The Administrator shall be appointed by the Governor of Puerto Rico, with the advice and consent of a majority of the members making up each Chamber of the Legislature of Puerto Rico, for a term of ten (10) years and until his successor is appointed and has qualified.

. . .

• • •

§ 3013. Functions, duties and powers of Commission

The State Election Commission shall be the body responsible for organizing and supervising all electoral procedures that govern any election to be held in Puerto Rico, pursuant to this act and its regulations.

. . .

§ 3017. Electoral Review Board, creation

The Electoral Review Board is hereby created to be composed of three (3) members appointed by the Governor, with the advice and consent of a majority of the members of each House of the Legislature of Puerto Rico, for a term of ten (10) years each, and until their successors are appointed and duly qualified.

. . .

• • •

§ 3022. Powers, obligations and duties of Board

The Board shall have the following powers, obligations and duties in addition to any others provided under this subtitle or its regulations:

. . .

(6) To investigate and resolve any appealed resolution, determination or order of the Election Commission.

(7) To perform any investigation it may deem necessary to adjudicate matters or controversies submitted for its consideration and resolution.

. . .

* * *

§ 3024. Review by Supreme Court

The findings of fact of the Board shall be final, but any aggrieved party may bring an appeal for review to the Supreme Court of Puerto Rico based on questions of law, provided it is done within the terms established in section 3023 of this title.

Every appeal for review brought to the Supreme Court of Puerto Rico under the provisions of this subtitle shall be processed pursuant to the Rules of Civil Procedure of Puerto Rico of 1958, as amended, except for those proceedings instituted at any time during the thirty (30) days prior to an election, in which case the rules adopted to this effect by the Supreme Court of Puerto Rico shall govern.

* * *

Chapter 303. Electors and Registration

* * *

§ 3052. Electors

Every person who is qualified to vote and wishes to exercise his voting rights has the obligation to register, pursuant to the provisions of this subtitle.

Likewise, every duly-registered elector who wishes to exercise his voting rights must do so on election day in the precinct and polling place in which he is registered.

§ 3053. Qualifications of electors

Any citizen of the United States of America and of Puerto Rico, domiciled on the Island, who has attained the age of eighteen (18) on the date of an election, and has been duly registered prior to that date, and is not legally disqualified to vote, shall be an elector in Puerto Rico.

§ 3054. Domicile of elector

For the purposes of this subtitle, the elector's domicile shall be his legal residence pursuant to the following guidelines:

(a) Every person has a domicile.

(b) There can be but one domicile.

(c) The legal residence or domicile is the place where a person habitually resides when he is not called elsewhere to work, or for some other temporary purpose, and to which such person returns during his rest periods.

(d) The legal domicile or residence may be changed by joinder of act and intent.

(e) A domicile cannot be lost until a new one has been acquired.

Provided that, any member of a military body or agency, department, or bureau of the Government of the United States of America shall not be deemed to have acquired domicile in Puerto Rico by the mere fact of being stationed or detailed in this Commonwealth, and, thus, shall not be entitled to vote.

* * *

§ 3057. Registration application

Every applicant for registration shall appear in person at any registration place in his legal place of residence, and shall present his registration application filled out in ball-point ink, or indelible pencil, on a form supplied therefor by the Commission, and shall consign, under oath, the following data:

(a) Applicant's name and his paternal and maternal surnames.

(b) Father's and mother's name.

(c) Sex, color of eyes and height.

(d) Birthplace, indicating municipality.

(e) Date of birth.

(f) Whether he is a citizen of the United States.

(g) Civil status, and if married, the spouse's legal name and surnames.

(h) Legal domicile, stating, in the case of an urban zone, the municipality, name of the sector, *barrio* or urbanization, street name or number, block or house number as the case may be; in the rural zone, all of the above, and, besides, the name of the rural road closest to the residence, the kilometer and the hectometer of the closest highway.

(i) Postal address, if different from the place of domicile.

(j) Place and date application is made.

(k) Applicant's signature or mark, or that of the person who is asked to do it because he does not know how to sign, or is physically impeded to do so.

(*l*) Authentication of signature.

The registration applications shall be printed with an original and six copies, shall be numbered consecutively in

sets, and shall be distributed in the following manner when duly filled out:

(a) Original and first copy to the Commission.

(b) Second, third and fourth copy for the first, second and third party in the voting order of the previous election procedure.

(c) Fifth copy for the applicant.

(d) Sixth copy for the political parties by petition.

Every applicant who is a naturalized citizen of the United States shall present a certificate attesting the fact of his naturalization, and in case he fails to do so, he shall be eliminated as an elector. In case the applicant was born in a foreign country as an American citizen, he shall present a certificate from the Department of State of the United States verifying such facts.

Any application that has any formal defects, lack of required data, or proper documents, shall be voided.

The Commission shall provide registration places by consulting the Local Commissions, so that the voters may register in places as close to their residence as possible. The Commission shall study the possibility of checking the registration applications with the records of the Vital Statics Registry of Puerto Rico, and if such study indicates that it is feasible, the Commission shall establish such verification through regulations to this effect, which will include a procedure to guarantee due process of law to every applicant.

* * *

Chapter 309. Procedures Prior to Election; Voting

* * *

§ 3218. Poll Board

In each polling place there shall be a Poll Board composed of one inspector and his substitute for each political

party, independent candidate or organization participating in the election, who are appointed by the central directing bodies of the parties or said candidates. A third official may be designated as clerk in each polling place.

. . .

§ 3229. Voting procedure

At nine (9:00) o'clock on election day, the members of the Polling Place Board present shall open the polling place. The electors shall form a line according to the order of arrival and shall file past the table one by one where the Poll Board is located.

The Board shall locate the person's name on the list of electors assigned to the polling place and within three minutes shall verify the elector's identity through an examination of his personal description and the Elector's Identification Card. If this verification is sufficient to establish the elector's identity, the Board shall proceed to hand him a ballot and a pencil to cast his vote. The elector shall sign or mark the final polling list on the line where his name is written when he receives his ballot.

The polling inspector may explain the voting procedure if requested to do so. It is forbidden for any other person in a polling place to instruct any elector as to the manner of voting.

The elector shall then proceed, alone, to one of the voting booths and shall proceed to vote using the corresponding marks. Only one person may be in a voting booth at a time, except as provided by law or regulations for physically disabled persons, and the voter may remain in the booth only as long as he needs to cast the vote.

When he has voted, but before leaving the voting booth, the voter shall fold the ballot several times in such a way that no part of the face shall be exposed to view. As soon as this operation is completed, he shall leave the booth and

shall deposit his ballot in the ballot box in the presence of the poll inspectors.

Every voter shall leave the polling place immediately after voting.

* * *

§ 3234. Challenge of a voter

Any voter or inspector who has good reason to believe that a voter who has come to vote is doing so illegally, or has already voted in another polling place or precinct, may challenge his vote for the reason that made it illegal, pursuant to the provisions of this Act, but such challenge shall not prevent the person from voting. The ballot of every voter whose vote is challenged, must be marked with the word "Challenged" on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge, the Electors Identification Card number of the person affected, the municipality, precinct and number of the polling place. If the challenged voter denies the challenge he must sign the challenged ballot on the reverse, under oath, but if he does not deny it, his vote shall not be counted and shall be null and void. The Administrator shall send to each Polling Place a sample Challenged Ballot to show the Polling Place Board how to fill out a challenge.

* * *

Chapter 311. Procedures After Voting

§ 3261. Canvass

After the voting is over at the polling place, the polling officials shall begin to canvass the voted ballots. During the same, such ballots shall be classified as the case may be, in the following categories:

(a) "Straight Ballot"

(b) "Split Ballot"

(c) "Challenged Ballot"

(d) "Protested Ballot"

(e) "Nonadjudicated Ballot"

(f) "Blank Ballot".

After the canvass is begun, no member of the Poll Board shall leave the polling place under any circumstances and shall remain therein until the canvass is completed and the results thereof announced by posting a copy of such results on the door of the polling place.

The Commonwealth Election Commission shall establish the way in which the canvass of votes shall be conducted through regulations to such effect.

* * *

§ 3263. Challenged ballot

All challenged ballots shall be counted for the candidates for whom they were marked except when such ballot is also protested or not adjudicated for any reason.

If after an election it should be established that a challenged ballot was voted by a person or voter with no right to vote in said election, the Commission shall order the annulment of the vote as well as the amendment of the canvass.

* * *

APPENDIX G

SUPREME COURT OF PUERTO RICO

No. 0-80-713—Review

OSVALDO MOLINA, *Petitioner-Appellant*,

v.

GERINELDO BARRETO PEREZ, *Appellee*,

and

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Appellant*.

PER CURIAM

San Juan, Puerto, December 24, 1980

Yesterday we submitted the following Resolution:

"The request brought before us, presents the question of whether the Electoral Review Board acted correctly by denying to dismiss and assume original jurisdiction in case No. JR-80-279, *Osvaldo Molina Vazquez* v. *Barreto Perez*, consolidated with JR-80-281, *Partido Popular Democratico y Cepeda* v. *Barreto Perez*. Essentially such procedures primary purposes are to revise the adjudication by the Electoral Commission of the recused ballots, which, containing a counterdeclaration of the elector, were adjudicated by unanimity in the primary forum of the Commissioner based on some agreements previously established, adopted as part of the process of general scrutiny of ballot by ballot realized in relation to District Representative No. 35. It is argued that the intervention of the Board results in substituting the Commission as the legal authorized organism to receive oral and

extensive documental evidence to the ballot and electoral documents, even determining and settling the veracity of the declarations over recused ballots, a question which is of the competence in first instance of the Electoral Commission. Art. 6.003. It is argued that by so acting without the legal faculty or authority, the Review Board consolidates and mixes actions of different natures, and by so acting delays and postpones the decision of the on time submitted appeals against Cepeda in cases JR-274, JR-275, JR-276, JR-277, JR-278, JR-280, JR-282, JR-283 and JR-284 about corrections of errors and rectification of the counting process, which should be known within the earliest time that can provide a final correct computation for the Commission and the certification of the elected candidate, leaving safely for the candidate that loses, when it properly proceeds, the action to question the validity provided in Art. 6.015 of the Electoral Law which in the order of legal procedure is later than, and not before then, to the certification by the Commission of the candidate who obtained the greater number of votes.

Considering what has been stated above, it is granted appelles' Osvaldo Molina, Samuel Cepeda and Popular Democratic Party and to the General Elections Administrator until 12:00 AM Wednesday, December 24, 1980, to show cause by which it shouldn't be dismissed by absence of jurisdiction and prematureness of the actions submitted by them before the Electoral Review Board (JR-80-279 and JR-80-281) and order this organism that by or before Friday, December 26, 1980, to delucidate and resolve, with maximum diligence, the validity of the ballots involved in the appeals of Samuel Cepeda (JR-80-274, 275, 276, 277, 278, 280, 282, 283 and 284) that were not adjudicated by unanimity by the Electoral Commission.

To aid our jurisdiction this Court paralyzes the proceedings in the appeals of Osvaldo Molina and Samuel Cepeda before the Review Board (JR-80-279 and JR-80-281) while we submit the decision of this appeal. It is ordered that the Board and Commission abstain to certify any candidate for District Representative No. 35 until the final and firm decision is submitted in appeals JR-80-274, JR-80-275, JR-80-276, JR-80-277, JR-80-278, JR-80-280, JR-80-282, JR-80-283 and JR-80-284."

Appellee Molina appealed on time.

Not barring produced certifications by the Electoral Commission about election of candidate of the Representative District No. 35, *prima facie*, the Review Board would lack jurisdiction to deal in the action of Osvaldo Molina and Samuel Cepeda (JR-80-279 and JR-80-281) brought before this forum.

In the scheme disposed by the Electoral Law, Articles 5.034 and 6.003 regulate all that concerns the process of recusation of ballots and the sending of its adjudication to the State Commission of Elections. The first of those articles establishes the procedure to be followed the day of the elections and the second one prescribes the rules for the later adjudication of the ballots so challenged. Of its reading and interaction with the rest of the dispositions of the law relative to the adjudication of every ballot that we perceive that as a general rule the concept "adjudication" means the examination of the ballot, the verification of the candidates for whom they were voted and the canvass of the vote so emitted on behalf of such contestants. In contrast, in the case of a challenged ballot, the term acquires a different meaning. Thus, a challenged ballot constitutes an attack to the legality of the vote and its validity—total or partial—will depend then on the verification of the certitude of the fundamental principles invoked

for such recusations. It is unavoidable to conclude, then, that as to these, one should distinguish between the adjudication of the vote from the purely formal or of accounting points of view—on behalf or for whom the ballot was casted—and the substantive or of depth point of view, that is, if the ballot was or was not illegally voted because the elector did not meet all the requirements that would have qualified him as such.

In virtue of that difference and conceptualism, we warn that the substantive adjudication or in its depth of a challenged ballot is a process, by nature, different to the ordinary and normal transaction followed during the canvass. It requires the existence of a mechanic of full adjudication that emits the fact of the ballot, which is of an adversative nature, surrounded by the minimum constitutional rights of the due process of law, such as the notification of the elector summoning of the witnesses and defile and evaluation of the evidence before the Electoral Commission or its examiner. Such process nor scheme were established by the said Commission, that as we have seen, was the primary administrative forum with jurisdiction according to the law for eludicating in depth such ballots.

What we had exposed before will not decide in any way the legal action before us. As maximum custodians and guardians of the legal rights which are expressly given by the Constitution of the Commonwealth of Puerto Rico, *P.P.D. and P.S.P.* v. *Barreto Perez*, res. November 14, 1980, we cannot withdraw ourselves of the difficult situation which raised the present case. As we held in the above cited opinion, "the country is through a difficult time and tension. In this laborious circumstances it is absolutely necessary that we must behave serenely and with good sense and judgment. What is important and vital is the victory of the whole people of Puerto Rico; that the quality of its democracy will not be reduced or be spotted the electoral process that our Constitution and our laws will be scrupu-

lously respected. We make a call to the country in order to maintain in all times the maximum tranquillity and civility."

With this perspective in our minds, the correct determination of who was the elected candidate to occupy the Representative District Number 35 seat in the House of Representatives comes from the clear and unquestionable requirement of the right to vote of each one of the electors that constitutes the electoral body of the Representative District Number 35. Art. II, Sec. 2, Constitution of the Commonwealth, Art. 2, paragraph 2, of the Electoral Law. On the other side we must advise that the due functioning of the Legislative Branch would be less clouded, and it is possible that it would be stayed until the final result of the election would final. According to the above, as well as, of not having provided the Commission with the adequate mechanisms for the adjudication in depth of the challenged ballots—as was its duty under the dispositions of Article 6.003 of the Electoral Law and Rule 62 of the Regulations of the 1980 General Elections—as a consequence of which, the Review Board was obliged to enter in the elucidation of the matter, as to what concerns representative district number thirty-five (35), and that in addition, the processes to that effect initiate were pretty advanced, in the presence of the manifested need to protect adequately the constitutional rights of the electors, as well as, to make feasible the prompt resolution of the situation that arose, the only effective remedy in the specific circumstances of the actual case that constitutes it, in our opinion is to acknowledge to the Review Board under clause 1 of Art. 1.002 of the Electoral Law, the authority to finish the adjudication in its depth already started of the challenged ballots in the meationed representative district number thirty-five (35).

Sentence will be confirmed in conformity with what has been exposed.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-80-713—Review

OSVALDO MOLINA, *Petitioner-appellant*

v.

GERINELDO BARRETO PEREZ, *Appellee,*

and

PARTIDO POPULAR DEMOCRATICO and SAMUEL CEPEDA, *Appellees.*

JUDGMENT

San Juan, Puerto Rico, December 24, 1980

On the grounds exposed in the preceded Per Curiam Opinion, which we heretofore make an integrated part of the present one, the Court orders to the Electoral Review Board that on or before December 31, 1980, elucidate and decide with utmost diligence, the validity of the ballots involved in all appeals JR-80-274, JR-80-275, JR-80-276, JR-80-277, JR-80-278, JR-80-279, JR-80-280, JR-80-281, JR-80-282, JR-80-283 and JR-80-284. It is ordered that the Board and the Commissioner abstain to certify any candidate to District Representative No. 35 until a final and firm decision comes down on such appeals, keeping this Court jurisdiction to all pertinent ends.

So pronounces and order the Court and certifies the Secretary.

December 24, 1980

Ernesto L. Chiesa
Secretary

IN THE SUPREME COURT OF PUERTO RICO

No. 0-80-713—Review

OSVALDO MOLINA, *Appellee,*

v.

GERINELDO BARRETO PEREZ, General Administrator of Election, *Appellee,*

and

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Appellants.*

RESOLUTION

San Juan, Puerto Rico, December 30 of 1980

Having seen the appearance of the Electoral Review Board in the case quoted, dated December 29, 1980, and expressing to the Court the reasons which impede them, notwithstanding the efforts realized, to comply with the mandate of this Court to elucidate and decide on or before December 31, 1980, all the submitted appeals, the Court allows such forum of appeals so that on or before January 15, 1981, complies fully with the referred order.

The Court retains jurisdiction over this matter and orders the Electoral Review Board and the Electoral State Commission and its Administrator that until the final and firm decision is held in the previously referred cases and this Court orders, abstain to certify any candidate as elected representative for Representative District #35.

The Court so orders and certifies the Secretary.

December 30, 1980.

Ernesto L. Chiesa
Secretary

APPENDIX H

TRANSCRIPT FOR HEARING HELD ON JANUARY 4, 1981
Volume 18, p. 3504

• Ledo. Ortiz Alvarez: It is the clear evidence, unequivocal and conclusive.

• Ledo. Gonzalez: that is . . . that would lived to the Board take a decision or determination, based on a supposition or of a circumstantial evidence which, as properly cites Pedro Ortiz, in his function of today, that the evidence we must have here must be a clear, unequivocal evidence, and those numbers then in no way would neither be clear, unequivocal nor convincing, that that was the adjudication of the ballot of Jesus Acosta Berrios.

• Andreu Garcia: No pardon me, that is the effect of the evidence, if the Board understands that that isn't evidence unequivocal, clear and convincing so it will determine, but what we are proposing is to submit that evidence if the evidence of ours do not convince in the form that it should convince to the Board, well that is . . . .

• Judge Schmith Monge: Already this Board has decided that it will utilize the preponderance of evidence as a criteria of evidence, and so we let it be known to Attorney Ortiz Alvarez . . . and not the evidence of clear-unequivocal and conclusive.

APPENDIX I

IN THE SUPREME COURT OF PUERTO RICO

No. R-68-151—Review

ISABEL ANTONIA GARCÍA LÓPEZ, ETC., *Plaintiffs-appellants*

v.

JUAN, ALEJANDRO, and MANUEL MÉNDEZ GARCÍA ET AL., *Defendants-appellees.*

MR. JUSTICE TORRES RIGUAL delivered the opinion of the Court.

San Juan, Puerto Rico, May 31, 1974

In this appeal we are reviewing the judgment of the trial court which dismissed the complaint filed by appellant Isabel Antonia García López to revendicate community property and to decree the nullity of some actions and of the judicial proceedings which simulatedly conveyed said property away from the patrimony of the conjugal partnership constituted by appellant and her husband at that time José Méndez García. Appellants challenge the judgment of the trial court, assigning as errors committed by the trial court: 1) in concluding that the alleged fraud was not established, 2) in concluding that the transaction between the parties carried out on November 22, 1943 and clarified through order *nunc pro tunc* on July 7, 1947, was valid, 3) in declaring as valid and correct the liquidation of José Méndez García's personal account in the Mercantil Sobrinos de A. Méndez y Hermano, as well as the judicial proceedings and adjudications made to Juan Méndez García, one of appellees, in civil cases No. 42-626 and 42-625 and the donations made under deeds Nos. 6 and 5 of April 14, 1960, executed before notary Edelmiro Martínez, Jr., 4) in dismissing the five causes of action set forth in the complaint.

The first, third, and fourth errors are closely related, appellants relying on the same arguments. We shall discuss them jointly.

I

The trial court dismissed the complaint when it understood that there was no evidence of fraud or simulation. It relied on the principle of law to the effect that fraud is not presumed, requiring from appellants an unreasonable degree of proof which in essence detracts from the justice of the case.

The general rule to the effect that fraud is not presumed means only that he who alleges it should establish it with reasonable certainty so as to satisfy the conscience of the trier. *Cf. Carrasquillo* v. *Lippitt & Simonpietri, Inc.*, 98 P.R.R. 646, 650 (1970). It does not mean that fraud has to be established with concluding evidence nor with mathematical certainty, since, as we know, this proof is rarely possible.

Actually, we do not see a fundamental difference between the non presumption of fraud and the general rule requiring preponderance of evidence to establish a fact. The difference is rather in the nature of the fact to be established and not in the rules themselves. Experience tells us that there are facts which may be easily established while there are others more difficult to establish. But always, in one case or the other, the fact should be established with preponderance of evidence and not on the basis of conjectures or speculations.

Appellants' evidence in the case at bar showed with reasonable certainty the existence of fraud. A careful examination of said evidence convinced us that the trial court erred in dismissing the complaint.

For a better understanding of the facts it is convenient to identify the parties. Appellants are Isabel Antonio

García López and her children José Victor and María Isabel Méndez García. The latter originally joined in the action as defendants but later joined the mother as plaintiffs in the principal action. Appellees Juan, Alejandro, and Manuel Méndez García are brothers of José Méndez García, former husband of appellant Isabel Antonia. Their children Rosa María, Aurora Margarita, and Joaquín Reymundo Méndez García together with Ferretería Méndez, Inc. are also appellees and defendants in the principal action.

It appears from the record that as soon as appellant Isabel Antonia García López filed an action for divorce against her husband José Méndez García on June 27, 1942, the latter in connivance with his brothers embarked on a series of simulated acts which divested the former of her participation in the conjugal partnership.

The action for divorce had not been answered yet when, on July 31 José Méndez García and his brothers Alejandro and Manuel, were arranging the liquidation of their personal account in the Sociedad Mercantil Sobrinos de A. Méndez y Hermano, S. en C., José remaining as a simple employee with a monthly salary of $150. The liquidation was made a public document by means of deed No. 126 of October 5, 1942 before notary Eduardo F. H. Dottin. From this deed it appears that José had no funds to liquidate his debt with the partnership, reason why he paid to the latter the capital he had furnished there remaining a balance due of $98.22.

This alleged situation of indigence did not bar him, however, from incorporating a month later, on November 30, 1942 together with his aforementioned brothers the Ferretería Méndez, Inc. The Clauses of Incorporation filed in the Department of State reveal that José signed and paid 75 shares for a value of $7,500. A month later the Sociedad Mercantil was dissolved and his assets were transferred to Ferretería Méndez, Inc.

The liquidation of José's personal account did not alter his powers and responsibilities in the business. José continued exercising his functions and powers as partner: His own daughter María Isabel Méndez García testified "He was one of the bosses and he was in charge of hiring employees and he saw what was needed and bought it and he was rather, in control." (Fifth piece Tr. Ev. p. 14.) Testimony which should be taken into consideration because, as we shall see, it is against her own interest. Likewise the testimony of José Víctor Méndez, (Fourth piece Tr. Ev. p. 70).

Moreover, José continued living comfortably in Miramar with an automobile and chauffeur at his service and several employees in the domestic service. (Fourth piece Tr. Ev. p. 71.)

Together with the foregoing acts it appears from the record of this case that appellee Juan Méndez García filed two actions for the recovery of money against his brother José. On February 5, 1943, before the divorce was decreed, Juan filed civil case No. 42-625 in the former District Court of San Juan, by means of which he claimed from his brother the recovery of $2,109.87 for merchandise sold on charge account. On that same date he filed also a claim for the recovery of money in civil case No. 42-626 claiming the payment of a remainder of $1,345 for a loan he had allegedly made to José for the purchase of three lots in Castro Viñas Street of Santurce. He also claimed $244.85 for advance payments he had made to third persons for José's benefit.

It is immediately self evident that both debts had the character of community property, however, José was sued in his personal character and not as administrator of the conjugal partnership; that José did not answer the complaint and consequently, judgment by default was entered and one of the lots acquired in Castro Viñas Street was attached. The brother Juan acquired the lot for $1,100 in

the auction, the other brother Alejandro Méndez García serving as surety for the attachment.

It is very significant that the three lots originally acquired in Castro Viñas Street had been consolidated and divided in two; one of them was conveyed to Juan six days after the action for divorce was filed. In the deed of conveyance, deed number 81 of July 3, 1942 before notary Eduardo F. H. Dottin, the appearing parties set forth that despite the fact that in the deed of acquisition it appeared that said lots had been acquired by José and his wife, "the truth is that the acquisition was made by Don José Méndez García for him and his brother, parties hereto, Don Juan Méndez García in co-ownership of undivided property and on equal shares, the said Don Juan Méndez García having advanced half of the price of acquisition", which amounted to $2,690. (Plaintiff's Exhibit 3.)

The conveyance of one of the lots to Juan for half the price of acquisition, $1,345, "amount which the said Don Juan Méndez delivered prior to this act, for the payment of half of the three lots . . ." was agreed in deed number 81.

However, in the aforementioned action No. 42-626 the amount of $2,690 was claimed it being alleged that Juan had delivered it to José to be invested in the purchase of the lots. That is, on the one hand the deed says that Juan contributed half of the price, $1,345, amount which was paid when one of the lots was conveyed to him, and in the complaint for the recovery of money the total price of $2,690 was claimed. On the other hand, it is not logical nor convincing that Juan having contributed all the money for the acquisition of the lots, nevertheless, José appeared in the deed of sale, as acquiring them for himself to divide them later between both of them.

But, also, it appears from the record that despite the fact that Juan ruthlessly attached this property belonging to José, the latter later designated him in his will, as his executor relieving him from having to give bond, com-

missioner in partition, guardian of his minor children, and usufructuary in the free third. All of these appointments are of a fiduciary nature and in the natural order of human relations, trust is not placed in those who attach from us valuable property for relatively insignificant debts, unless there is a reasonable explanation therefor. This explanation appears from the record thus:

Several years later Juan donated the attached property to José's children and gave $8,000 in cash to each one of the five children complying thus ". . . with a mandate, a promise he had made to his brother and that with that action his conscience remained in peace." Testimony of Dr. Joaquín Méndez, son of José Méndez García, and Juan's nephew. (Fourth piece Tr. Ev. p. 73.) The donation was made through deed No. 6 of April 14, 1960 executed before notary Edelmiro Martínez Rivera, Jr.

The purpose of this transaction was described by José Víctor Méndez in the following manner:

"A. First, all the brothers gathered in the house of Rosa María Méndez, my sister. Then, we agreed that our father's estate was going to be distributed, as donation, for three reasons. The first one was to avoid that a daughter who was recognized by our father, found out that there was an inheritance, since for some years they stopped giving her anything and if she learned that there was an estate she was going to claim also." [Fourth piece Tr. Ev. p. 35.]

. . . . . .

A. *In the second place, so that our mother did not learn that what was being distributed was our father's estate.*

[*Id.* 36. Italics ours.]

. . . . . .

A. To prevent, likewise, the payment of tax to the Government of Puerto Rico. The amount in excess which could be paid." (*Id.* 36.)

José Méndez García's sons—José Víctor and Joaquín—knew, then, that the deed of gift executed by their uncle Juan Méndez García constituted a spurious act for the sole purpose of conveying them the father's estate eluding the community share of the mother in the property comprised therein. (Fourth piece Tr. Ev. pp. 39-40.)

Uncle Juan donated also to Rosa María Méndez García, José's daughter, another property located on Parque Street by means of deed No. 5 executed before the same notary Edelmiro Martínez Rivera, Jr., on the same date on which the deed of gift of the property located at Castro Viñas Street was executed. The property at Parque Street had been object of a mortgage foreclosure proceeding brought after the complaint for divorce was filed. Said property was also auctioned off by the brother Juan when the divorce was pending.

We must clarify that this property at Parque Street was included in the original complaint of this case as a second cause of action and was declared res judicata by this Court in *García López* v. *Méndez García*, 88 P.R.R. 352 (1963), reason why it is no longer part of this appeal. We set forth, however, the fact that it was also the object of a donation because it reflects a pattern of conduct similar to the one followed with regard to the property located at Castro Viñas Street acquired in auction and later donated to one of the heirs. Pattern which reasonably creates strong suspicious about the real and actual purpose of the transfer by donation.

The foregoing facts, together with the suspicious circumstance that all this transactions were held between close relatives, are sufficient to raise a presumption of fraud and shift onto appellees the burden to rebut it. *Nine* v. *Avilés*, 53 P.R.R. 471 (1938), *Texas Co. (P.R.) Inc.* v. *Estrada*, 50 P.R.R. 709, 716 (1936). They did not rebut said presumption, relying their case on the challenged documentary evidence and on the testimony of Manuel

Méndez García. Said testimony was limited to the transactions connected with the real property located on San Agustín Street of Puerta de Tierra and which we shall consider when we pass upon the second assignment.

The trial court erred in concluding that the alleged fraud was not established and, consequently, in declaring as valid the liquidation of José Méndez García's personal account in the Mercantil Sobrinos de A. Méndez y Hermano, as well as the judicial proceedings and adjudications made in civil cases Nos. 42-626 and 42-625, and the donations made under deed Nos. 6 and 5 of April 14, 1960, executed before notary Edelmiro Martínez, Jr.

II

Appellees maintain that all of appellants' claims have prescribed by reason of the lapse of more than 16 years since the occurrence of the facts set forth in the complaint. They argue that since the liquidation of the community property took place on November 22, 1943 the term appellants had to challenge the transaction for error, deceit or falsity of consideration, was of only four years that is the term fixed by art. 1053 of the Civil Code, 31 L.P.R.A. § 3512.

The liquidation of the conjugal partnership did actually take place on November 22, 1943 by means of a motion entitled Appearance of the Parties with Regard to the Liquidation of the Community Property, which insofar as pertinent provided the following:

"....

"3—That the conjugal partnership existing between the appearing parties has been duly liquidated and that as a result of said liquidation plaintiff-counter-defendant has received to her satisfaction and content from the hands of the defendant-counter-plaintiff the amount of $3,000 which is the just and reason-

able share corresponding to said plaintiff-counter-defendant for the aforesaid community property."

Pursuant to said stipulation the trial court entered an "Order" liquidating the conjugal partnership.[1] Four years later, on July 3, 1947, at the request of the attorneys of record it amended the so-called Order through an order *nunc pro tunc* substantially extending the scope of the stipulation. The amendment was to the effect that "whatever real or personal property existing at the date of the dissolution of the marriage shall belong only and exclusively to the defendant-counter-plaintiff since he has satisfied the plaintiff-counter defendant the share corresponding to her in the community property." Appellant challenged the stipualtion agreed upon in 1943 alleging that her consent was obtained through fraud, deceit, falsity, and undue pressure.

We agree with appellant in that her consent was obtained through deceit. Her contention, however, is late. The action for nullity for deceit prescribes four years after the contract is made. Article 1253, Civil Code, 31 L.P.R.A. § 3512, *Rivera* v. *Heirs of Díaz*, 70 P.R.R. 168 (1949) and *Girod Lube* v. *Ortiz Rolón*, 94 P.R.R. 386 (1967). The complaint challenging the transaction was filed about 16 years after the transaction was carried out, when the prescriptive term to bring it had already elapsed.

This, however, does not dispose completely of the different causes of action brought by appellant to annul the judicial proceedings and the actions we have mentioned in the course of this opinion. This is thus because the transaction agreed upon in 1943 covered only the property located at 45 San Agustín Street of Puerta de Tierra, which was the only community property that the parties had in mind when they agreed upon the stipulation.

---

[1] The so-called "Order" constitutes, a judgment for all legal effects.

The order *nunc pro tunc* is void and nonexistent because it was entered without jurisdiction, when the judgment was already final and unappealable. As it is known, orders *nunc pro tunc* may only correct errors of form, omissions or inadvertences but they cannot substantially alter the judgment when, as in the case at bar, it is final and unappealable. Rule 491 of the Rules of Civil Procedure, *Fernández* v. *Registrar*, 82 P.R.R. 523, 531 (1961), *Banco Popular* v. *Superior Ct.; Domínguez, Int.*, 82 P.R.R. 236, 242 (1961). The general waiver in favor of Juan Méndez García "as to whatever real or personal property" added by said order is, therefore, inoperative.

Let us see now the scope of the stipulation agreed upon in 1943.

We know that the intention of the parties determines the scope of the contractual obligations and that it is judged taking into consideration not only the acts contemporaneous and subsequent to the contract, but also all the other circumstances indicative of the will of the parties. Article 1234, Civil Code, 31 L.P.R.A. § 3472, *Merle* v. *West Bend Co.*, 97 P.R.R. 392 (1969).

In the case at bar the parties stipulated in November 1943 the liquidation of the conjugal partnership in the amount of $3,000 on the basis that the only property existing in the conjugal partnership was an undivided interest in one third of the property located in 45 San Agustín Street of Puerta de Tierra, consisting of a lot of about 1,336 square meters and a four-story building of reinforced concrete. All the other properties had been fraudulently conveyed by different means to the brothers of José Méndez García. Thus, the real property located at Castro Viñas Street and at Parque Street were auctioned and acquired by Juan Méndez García and later donated to José's children; José's personal account in the Sociedad Mercantil Sobrinos de A. Méndez y Hermano, was liquidated after the action for divorce was filed and before the matrimonial

bond was dissolved, José remaining as debtor of the Sociedad Mercantil and, José's shares in the Ferretería Méndez, Inc. were acquired by another brother named Ramón Méndez García. (Defendant's Exhibit 1.)

It is evident that the parties could not bear in mind property which did not "belong" to the conjugal partnership, it being their clear and definite intention in agreeing on the stipulation of the transaction, to liquidate appellant's share in the only property appearing at that time in the community property, the one located on San Agustín Street. The defense of prescription can only be opposed against the cause of action concerning this property.

Appellees also raise the defense of prescription against the challenge of the judicial proceedings in civil cases Nos. 42-625 and 42-626, and, against the challenge of the liquidation of José Méndez García's personal account in the Sociedad Mercantil, Sobrinos de A. Méndez y Hermano. We do not agree.

We are dealing here, as we have already seen, with non-existent fraudulent actions, without any juridical effect whatsoever for which there are no prescriptive terms. *Hernández* v. *Sec. of the Treasury*, 86 P.RR. 12 (1962), *Hernández* v. *Ayala*, 68 P.R.R. 883 (1948).

The argument to the effect that, assuming that the liquidation of the community property was inoperative at law because of deceit, the action to force the liquidation has prescribed also for the lapse of more than 15 years, has no merit either. The conjugal partnership terminated as soon as the marriage between the parties was dissolved, art. 1315 of the Civil Code, 31 L.P.R.A. § 3681. But while the liquidation of the partnership is still pending what exists at law is a common ownership which, in the absence of contract or special provisions, is governed by arts. 326 to 340 of the Civil Code, 31 L.P.R.A. §§ 1271-1285. The action to request the division of the common thing never

prescribes, reason why the lapse of time cannot defeat the justice on appellant's case.

Serrano v. *Talavera*, 65 P.R.R. 411 (1945), cited by appellees in their brief is not applicable since it refers to the rendition of accounts whose prescriptive term is of 15 years. Article 1864, Civil Code, 31 L.P.R.A. § 5294.

We repeat, the defense of prescription is only effective with regard to the cause of action concerning the property located on San Agustín Street, which as we have already seen, was the only one included in the 1943 stipulation.

Summarizing, we conclude that the trial court erred in dismissing the causes of action concerning the liquidation of José Méndez García's personal account in the Sociedad Mercantil Sobrinos de A. Méndez y Hermano and those concerning the nullity of the proceedings followed in civil cases Nos. 42-626 and 42-625. The cause of action with regard to the property located at Parque Street was declared res judicata in *García López* v. *Méndez García*, *supra*. The cause of action with regard to the conjugal participation of Isabel Antonia García López in the shares of Ferretería Méndez, Inc. was not substantiated, it appearing from the documentary evidence that said shares were sold by José Méndez García to Ramón Méndez García, who is not a party in this action. (Defendant's Exhibit 1.)

The trial court, after stipulation of the parties, divided the case in two stages; the first one to determine whether there was fraud and in the affirmative, to determine then the damages. Since it reached the erroneous conclusion that there was no fraud, it did not hold hearings to determine the damages. It is proper then to remand the case for said hearing to be held, limited to the decision herein.

Judgment will be rendered reversing the judgment of the trial court and the case will be remanded for further proceedings consistent with the foregoing pronouncements.

APPENDIX J

IN THE SUPREME COURT OF PUERTO RICO

No. R-70-266—Review

BRÍGIDO BERRÍOS RODRÍGUEZ, *Petitioner and appellant*

v.

MINING COMMISSION OF PUERTO RICO,
Respondent and appellee

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

San Juan, Puerto Rico, May 6, 1974

Appellant was denied by the Mining Commission of Puerto Rico a request for an exclusive permit for the study and exploration of hydrocarbons (gas and petroleum) in the Santa Isabel zone. The adverse decision of said administrative agency was notified to petitioner Berríos on December 23, 1968, but it was not notified to his attorney until January 14, 1969. The 28th of this same month of January, petitioner filed a petition for review before the San Juan Part of the Superior Court under the authority of art. 7 of the Mining Law, which is Act No. 9 of August 18, 1933 (28 L.P.R.A. § 118), as modified by Act No. 115 of June 26, 1958 (4 L.P.R.A. § 35). The San Juan Part dismissed the petition because it was filed after the term of 30 days provided in the cited art. 7 had elapsed. Upon so doing, it computed the time to appeal as of the notice to the party, and not to his attorney which was made later. Said art. 7 of the Mining Law (28 L.P.R.A. § 118) orders: "The decisions and findings of the Commission shall be final and unappealable, excepting those involving questions of law, as well as those concerning the compensating of owners of the land or of any property right therein, from which any party aggrieved may appeal before the . . . Court . . . ."

The Mining Law keeps silent as to whether the decision should be notified to the petitioner himself or to the attorney who represents him. Not thus the Rules of Civil Procedure which, directed to the "just, speedy, and inexpensive" determination of all suits of a civil nature in the General Court of Justice, order in Rule 67.2: "Whenever a party has appeared, represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Nothing prevents, however, that rules of the Rules of Civil Procedure be adopted in appropriate cases to guide the course of the administrative proceeding, when those principles propitiate a fair solution. *Martínez* v. *Superior Court*, 83 P.R.R. 691, 696 (1961).

Although in *Caparra Country Club* v. *Planning Board*, 74 P.R.R.69 (1952), the validity of a notice to the interested party instead of to his attorney was sustained, the jurisprudential precedent cannot be separated from the circumstance that in the act and in the Planning Regulations, but not so in the Mining legislation, it is provided that the notice shall be made to all interested officials or individuals for which purposes the party directly interested shall furnish his exact address. 23 L.P.R.A. § 18; 23 R.&P.P.R. § 4-44.

Only by an exception expressly authorized, and even thus with reluctance, can the notice to a party, ignoring his attorney, be accepted as sufficient. Once the remedy of appeal is provided by statute, in the administrative field as well as in the civil litigation, it is part of the due process of law and therefore the notice to the attorney who intervenes in representation of the interested person is indispensable in all the stages. And if the appeal is on matters of law only, how can we expect that the party who has retained the services of an attorney to protect his interests shall have an informed perception superior to that of the expert in law so as to permit him to take a correct decision

in view of the denial of his right? Evidently this was the opinion which encouraged the Mining Commission to serve notice directly and personally upon appellant's attorney three weeks after having notified his client. This was not a useless act but efficacious and proper, and it is from this last notice that the term for the administrative appeal should be counted.

The judgment of the Superior Court will be reversed and the case remanded to the trial court for the continuation of proceedings consistent with this opinion.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OSVALDO MOLINA, *Petitioner,*

v.

POPULAR DEMOCRATIC PARTY AND SAMUEL CEPEDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LINO J. SALDANA
Counsel of Record

SALDANA, LOPEZ-BARALT
& FEBUS-BERNARDINI
Post Office Box 13954
Santurce, Puerto Rico 00908
Caso Building, Suite PH-2
1225 Ponce de Leon Avenue
Santurce, Puerto Rico 00907
Telephone: (809) 724-5545
Attorneys for Respondents
Popular Democratic Party and
Samuel Cepeda

October 6, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD BE DENIED	7
1. The Questions Tendered In The Petition Were Not Properly And Timely Presented To The Supreme Court Of Puerto Rico	7
2. The Federal Questions Presented For Review Are Not Substantial And Do Not Warrant The Exercise Of This Court's Discretionary Certiorari Jurisdiction.	14
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: Page

Addington v. *Texas*, 441 U.S. 418 ..... 19, 20

Berrios v. *Mining Commission*, No. R-70-266 (P.R. May 6, 1974) ..... fn. 7

Blanco v. *Hernandez*, 18 P.R.R. 699 (1912) ..... fn. 5

Boerman v. *Herederos de Boerman*, 53 P.R.R. 211, 213 (1938) ..... fn. 5

Borinquen Furniture v. *District Court*, 78 P.R.R. 858-860 n. 6 13

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 677-78, 682 n. 9 (1930) 11, 17

Briscoe v. *Kusper*, 435 F.2d 1046 (7th Cir. 1971) ..... fn. 9

Cardinale v. *State of Louisiana*, 394 U.S. 437, 438-439 .. 8

Dick v. *New York Life Insurance Co.*, 359 U.S. 437, 443-446 20

Forbes v. *State Council of Virginia*, 216 U.S. 396, 399 8

Griffin v. *Burns*, 570 F.2d 1065 (1st Cir. 1978) ..... fn. 9

Hatch v. *FERC*, No. 80-1561 (D.C. Cir. June 26, 1981) . 18

Hennings v. *Grafton*, 523 F.2d 861 (7th Cir. 1975) ..... fn. 9

Herndon v. *Georgia*, 295 U.S. 441, 443 .....8, 11

Missouri ex rel. Missouri Insurance Co. v. *Gehner*, 281 U.S. 313, 320 11

Oronoz v. *Montalvo*, 20 P.R.R. 256 (1914) ..... fn. 5

Partido Nuevo Progresista v. *Perez*, 639 F.2d 825 (1st Cir. 1980) ..... fn. 9

Perez v. *Acevedo Quinones*, 100 P.R.R. 891, 897-99 13

Pettengill v. *Putnam Cty. R-1 School District*, 472 F.2d 121 (8th Cir. 1973) ..... fn. 9

Powell v. *Power*, 436 F.2d 84 (2d Cir. 1970) ..... fn. 9

Prieto v. *Maryland Casualty Co.*, 98 P.R.R. 583, 594-621 13

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 85 n. 9 11

Radio Station WOW, Inc. v. *Johnson*, 326 U.S., 120, 128 8

Ramos v. *Sucesion Serralles* 51 P.R.R. 350, 351 (1937) .. fn. 5

Re Winship, 397 U.S. 358, 378-381 16

Table of Authorities Continued

Page

Sanabria v. *Heirs of Gonzalez*, 82 P.R.R. 851 13

Saunders v. *Shaw*, 244 U.S. 317 17

Sauri v. *Sauri*, 39 P.R.R. 813 (1929) ..... fn. 5

Street v. *State of New York*, 394 U.S. 576, 582 ..... fn. 5, 14

Vazquez v. *Martino*, 46 P.R.R. 297, 298 (1934) ..... fn. 5

West Ohio Gas Co. v. *Public Utilities Commission*, 294 U.S. 63 18

CONSTITUTIONAL PROVISIONS

a. United States Due Process Clause, Fifth and Fourteenth Amendments 19

b. Puerto Rico 19

Art. II, Section 2 ..... 12, fn. 3

RULES AND STATUTES

Supreme Court Rule 21.1(h), 28 U.S.C.A. 14

5 U.S.C. 554 (b) (3) 18

28 U.S.C. §§1257(3) and 1258(3) ..... 7, fn. 4, 8

Sen. Rep. No. 735, 87th Cong. 1st. Sess. August 14, 1961 ..... fn. 4

4 L.P.R.A. § 36 12

16 L.P.R.A. § 3024 4

16 L.P.R.A. § 3066 2

16 L.P.R.A. § 3001 et seq. (Supp. 1979) ..... fn. 1

16 L.P.R.A. § 3234 ..... 3, 11, 21, 22, 23, 24

16 L.P.R.A. § 3263 3

32 L.P.R.A. §1679 ..... fn. 7

32 L.P.R.A. App. IV ..... fn. 7

COMMENTARIES

James & Hazard, *Civil Procedure*, 2d ed. 1977, 240-9 16

McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 246 n.44 (1944) 17

McCormick, *Handbook of the Law of Evidence*, (2d. ed. 1972), 784, 793, 796-798 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-434

OSVALDO MOLINA, *Petitioner,*

v.

POPULAR DEMOCRATIC PARTY AND SAMUEL CEPEDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The petition for a writ of certiorari requests that this Court review a judgment rendered in a statutory local election contest by the Supreme Court of the Commonwealth of Puerto Rico. In its judgment the Supreme Court decided that certain contested ballots were valid and others were not, reversed the decision below issued by the Electoral Review Board ("Board"), and declared respondent Cepeda — the Popular Democratic Party ("PDP") candidate — House Representative elect for District No. 35 over his opponent petitioner Molina, the New Progressive Party ("NPP") candidate.

The contested ballots involved in the Supreme Court proceedings were cast during the November 4, 1980 general election by voters in Representative District No. 35 which includes six precincts located in the northeastern tip of Puerto Rico, and in the two adjacent smaller islands of Vieques and Culebra. For the purposes of general elections which are held every four years to fill local public offices, the Commonwealth of Puerto Rico is divided into 113 precincts. Voters in the six precincts within Representative District No. 35 elect, among other officials, a representative for that district to the House of Representatives of the Commonwealth.

Forty such ballots were in controversy in the Supreme Court proceedings, thirty of which had been cast at the polls for the PDP candidate and ten for the NPP candidate. The election in District No. 35 depends on the validity of those ballots.[1] Most of the ballots had been challenged on the ground that the voter did not maintain his domicile or legal residence in District No. 35 on or before July 6, 1980. Under the Electoral Law of Puerto Rico, all persons who were residing within District No. 35 by July 6, 1980 were entitled to vote in said electoral district. (Pet. 80a). See Article 2016, 16 L.P.R.A. § 3066. Thus, the issue raised by a majority of the controversial ballots was simply whether or not the elector was domiciled in District No. 35 at the relevant date. Some of the contested ballots had been challenged on the basis that the electors' transfer petitions, timely made in order to appear on the lists of the precincts where they voted, had not been perfected. The issue raised as to such ballots was whether, under the Electoral Law and the Constitution of Puerto Rico, they should be counted as voted, in view of the fact that the transfer petitions had not been perfected due to clerical errors "for which they were not responsible" (Pet. 29a), and "which bore no consequence." (Pet. 35). One ballot was challenged on the

---

[1] The general election for local offices held on November 4, 1980 was the closest election in the history of Puerto Rico. During the 1976-80 period the NPP controlled the governorship and the majority in both the Senate and the House of Representatives of the Commonwealth of Puerto Rico. The 1980 general election was conducted pursuant to a new Electoral Law enacted on December 20, 1977 by the NPP government. This new electoral law introduced many changes — some quite drastic — in Puerto Rico's electoral procedure. (Pet. 7a-9a). See 16 L.P.R.A. 3001 et seq. (Supp. 1979). The incumbent NPP gubernatorial candidate won by a margin of 3434 votes over the PDP challenger from a total of over 1.6 million votes cast. The PDP won control of the Senate, 15 seats to the NPP's 12 seats. Control of the House of Representatives apparently depends on the election in District No. 35, although final judicial resolution of an after-election dispute over the District No. 31 seat is still pending because of an appeal recently filed before this Court (No. A 81-328).

ground that an elector's transfer petition prepared by a registration officer, due to error or negligence when the elector went to register, could not be considered a valid petition for registration, despite the fact that the Electoral Commission, contrary to regulations, never gave the elector notice of any omission or error preventing completion of his registration. (Pet. 41a-44a). Another ballot was challenged because it was bearing multiple marks. (Pet. App. A, 60a-64a; 107a).

A number of the challenged ballots were defended on the ground of non-compliance with statutory requirements of the challenge procedure. (Pet. 24a). Thus, when the challenger failed to subscribe his signature under the written challenge, as required in Article 5034, 16 L.P.R.A. 3234, the question presented was whether such challenge was void or not. (Pet. 25a). Some of the challenged ballots were also defended on the basis that the Board failed to give the elector adequate notice and opportunity to appear at the hearing where the propriety of the challenge to his vote was examined and adjudicated. (Pet. 28a). Finally, some of the contested ballots were defended on the ground that the only valid ground for the challenge, when examining the ballot for adjudication, is the one alleged by the challenger in writing and under oath, as required by the Electoral Law. (Pet. 25a-27a).

Under the Electoral Law of Puerto Rico all challenged ballots are initially counted by the Electoral Commission ("Commission"). Article 6003, 16 L.P.R.A. § 3263. At the end of a ballot-by-ballot recount, the Commission determined that the NPP candidate, petitioner Molina, had an advantage of five votes over the PDP's candidate, respondent Cepeda. (Pet. 12a). Respondents PDP and Cepeda timely appealed to the Board alleging miscalculations and incorrect adjudication of 60 ballots by the Commission which, if corrected, would tip the balance in Cepeda's favor. (Pet. 12a). Petitioner Molina cross-appealed the adjudication of 53 ballots to respondent Cepeda. (Pet. 12a, 140a). The appeals and cross-appeals were filed during the period extending from December 17 to December 22, 1980. The Board conducted hearings on the ballot challenges not dismissed voluntarily or abandoned by

the parties. The hearings were completed on January 9, 1981 and, on January 14, 1981, by a two-to-one vote, the Board issued its decision annulling twenty eight votes cast for respondent Cepeda and three votes cast for petitioner Molina. It also corrected a miscalculation of four votes which had been adjudicated by the Commission to petitioner Molina. According to the majority opinion of the Board, petitioner Molina won the election in District No. 35 by a margin of twenty five votes which was reduced to twenty three through amending resolutions of January 16 and 21, 1981. The dissenting and concurring opinion filed by the third member of the Board disagreed with the majority's decision as to the validity of most of the challenged ballots. It reached the conclusion that respondent Cepeda was the winner in the election by a margin of seven votes over petitioner Molina. (Pet. 13a-14a).

No federal question was raised by either party in the Board proceedings. The issues presented to the Board were limited to matters concerning the facts and the interpretation or application of local law. (Pet. 13a-14a). Pursuant to Article 1024, 16 L.P.R.A. § 3024, respondents PDP and Cepeda appealed to the Supreme Court of Puerto Rico the Board's adjudication of forty ballots. Petitioner Molina did not cross-appeal. The entire record of all the evidence and proceedings before the Board (including pleadings, transcripts of oral testimonies and exhibits) was remitted to the Supreme Court, pursuant to the applicable rules and to a specific order of the Supreme Court requiring the filing of a transcript of all oral testimonies given before the Board. Petitioner Molina did not raise any federal question in his opposition to the petition for review nor in his brief on appeal, nor at any other time during the presentation of his appeal to the Commonwealth Supreme Court. The only issues raised by him on appeal concerned the facts and the interpretation or application of Commonwealth law.

On June 23, 1981 the Supreme Court of Puerto Rico reversed the decision of the Board and held that respondent Cepeda had won the election in District No. 35 by a margin of nine votes over his opponent petitioner Molina. (Pet. 1a-

109a).[2] The Court determined that the standards used by the Board when it passed on the challenged ballots "are not the most adequate nor are they in harmony with the fundamental constitutional rule which guarantees the expression of the will of the people by means of equal, direct and universal suffrage . . ." (Pet. 1a).[3] Taking into account the "privileged status given by the Constitution [of Puerto Rico] to the exercise of suffrage free of coercion, and to its secretiveness" (Pet. 21a), it held *inter alia* that the evidence to annul a vote must be clear, strong, and convincing; that challenges to be effective must strictly comply with all statutory requirements both substantive and procedural; that when passing on a challenge none other than the grounds raised therein shall be considered; that the challenged elector must be given ample opportunity to appear and defend the validity of his vote; that the domicile of an elector shall be determined pursuant to the rules in the Electoral Law, particularly his *animus manendi;* and that a vote shall not be annulled, nor its validity questioned, for errors for which the elector is not responsible. (Pet. 2a, 3a, 14a-65a). As the Board had failed to apply these

---

[2] Five justices joined in the opinion delivered by Justice Irizarry Yunque. A separate opinion concurring with the decision was filed by Justice Negron Garcia. Justice Davila disqualified himself. (Pet. 1a-158a). A dissenting opinion was filed by Justice Martin. (Pet. 138a-158a). He disagreed with most of the holdings and with the reasoning of the majority, but coincided that the Board's decision in favor of petitioner Molina could not stand. His conclusion as to the proper disposition of the appeal was that ". . . neither this Court nor the Board, if the case were remanded, would be in a position to determine with certain finality who was the candidate that the qualified electors tried to elect as representative for Representative District No. 35, whereby I conscientiously cannot reach another conclusion other than ordering a new election for House Representative for Representative District No. 35." (Pet. 158a).

[3] Article II, Section 2 of the Constitution of the Commonwealth of Puerto Rico provides that: "The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizen against any coercion in the exercise of the electoral franchise."

controlling standards, using instead other erroneous rules, the Court determined that the Board's judgment was erroneous and should be reversed. Findings of fact made by the Board on the basis of erroneous standards were held not to be binding on appeal. (Pet. 22a). With all the evidence before it, the Supreme Court of Puerto Rico decided to make the required findings of fact itself, in the exercise of its power of complete disposition of the case on appeal, in such a way as to meet the exigencies of the particular election contest case involved. The Court proceeded to review the evidence concerning each of the forty challenged ballots, made the required findings of fact and conclusions of law, and adjudicated the votes to either petitioner Molina or respondent Cepeda. It upheld the Board's determination as to eight of the ballots involved, four of which had been adjudicated by the Board to petitioner Molina and four to respondent Cepeda. It overruled the Board as to the other thirty two ballots, upholding the validity of twenty six votes that had been cast for respondent Cepeda, but had been annulled by the Board, and annulling six votes cast for petitioner Molina which had been adjudicated to him by the Board. The final tally, on the basis of the Supreme Court's adjudication of the challenged votes, gave the election to respondent Cepeda by a margin of nine votes.

Petitioner timely moved for reconsideration of the Supreme Court judgment on July 7, 1981. In his motion he raised a federal question for the first time in the Commonwealth proceedings, alleging violations of the Fifth and Fourteenth Amendments to the United States Constitution in the adoption of the clear, strong, and convincing evidence standard of proof and in the Supreme Court's failure to remand for a new trial. (Pet. 1d-3d). The motion for reconsideration also alleged for the first time a violation of the challengers' constitutional right not to have their votes diluted, in the Supreme Court's failure to adjudicate on the merits those challenges lacking subscribed signature under the written challenges. (Pet. 16d).

The motion for reconsideration was denied by the Supreme Court without opinion on July 28, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Questions Tendered In The Petition Were Not Properly And Timely Presented To The Supreme Court Of Puerto Rico.

The judgment of the Supreme Court of Puerto Rico was rendered on June 23, 1981. (Pet. 1c). Prior to that judgment, no federal question had been raised either in the Electoral Review Board or in the Commonwealth Supreme Court. A motion for reconsideration was filed by petitioner Molina on July 7, 1981 (Pet. 1d-24d) raising for the first time the three federal questions set forth in the petition. (Pet. i). It was denied without opinion on July 28, 1981. (Pet. 1e).

The jurisdiction of this Court is invoked pursuant to the 28 U.S.C. §1258(3). Subsection (3) grants jurisdiction to review final judgments of the Supreme Court of Puerto Rico by writ of certiorari ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statute of, or commission held or authority exercised under, the United States." The jurisdiction so conferred upon this Court is comparable to its jurisdiction to review final judgments or decrees of state courts under 28 U.S.C. §1257(3).[4] As is true under 1257(3), the "specially set up or

---

[4] Section 1258 of the Judicial Code is copied almost verbatim from the provisions in Section 1257. It was adopted ". . . in view of the change of the status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact" and for the purpose of providing for ". . . review [of] final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the several States of the Union are now reviewed by [the Supreme] Court." Sen. Rep. No. 735, 87th Cong., 1st Sess., August 14, 1961. This Court's Rule 54 provides that "[t]he term 'state court' when used in the Rules of this Court, normally includes . . . the Supreme Court of the Commonwealth of Puerto Rico (See 28 U.S.C. §§1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes . . . of the Commonwealth of Puerto Rico."

claimed" provision in §1258(3) requires that the federal question be timely and properly presented to the Commonwealth Supreme Court. If the question is not so raised and the Supreme Court of Puerto Rico declines to consider it, this Court is without jurisdiction to review the judgment on writ of certiorari. See *Cardinale* v. *State of Louisiana*, 394 US 437, 438-39.

Ordinarily the proper and timely presentation requirement is not satisfied when, as here, the federal questions were raised for the first time after judgment by the Supreme Court of Puerto Rico, upon a motion for reconsideration or petition for rehearing, and that Court did not entertain nor decide the federal questions so advanced. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128; *Herndon* v. *Georgia*, 295 U.S. 441, 443; and *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399.[5] Petitioner apparently alleges, however, that his motion for reconsideration was timely because "the Puerto Rico Supreme Court's holding that the 'clear, strong and convincing' standard must be applied to electoral ballot contests represents a radical change in the standard of proof that could not have been foreseen by the parties." (Pet. 11). He also claims that other holdings on local issues made by the Supreme Court of Puerto Rico were equally "unforseen and unforsee-

[5] As stated by this Court, if the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. See *Street* v. *State of New York*, 394 U.S. 576, 582. In the present case the Puerto Rico Supreme Court's denial of petitioner's motion for reconsideration, without deciding the federal questions raised therein, was based undoubtedly upon its established practice not to consider or decide questions raised for the first time in a motion for reconsideration addressed to a judgment previously rendered. See *Blanco* v. *Hernandez*, 18 P.R.R. 699 (1912); *Oronoz* v. *Montalvo*, 20 P.R.R. 256 (1914); *Sauri* v. *Sauri*, 39 P.R.R. 810, 813 (1929); *Vazquez* v. *Martino*, 46 P.R.R. 297, 298 (1934); *Ramos* v. *Sucesion Serralles*, 51 P.R.R. 350, 351 (1937); and *Boerman* v. *Herederos de Boerman*, 53 P.R.R. 211, 213 (1938).

able by the parties," and that such holdings unexpectedly created the federal questions, raised on reconsideration below and now presented in his petition for certiorari, which he had no previous reasonable opportunity to assert and could not fairly have anticipated. (Pet. 16, 20, 23).

The Puerto Rico Supreme Court holdings on local law which allegedly gave rise to the federal questions presented in this petition were the following: (a) That the evidence required to annul a vote must be clear, strong and convincing, rather than merely preponderant; (b) that a challenge is ineffective and void when the challenger fails to suscribe his signature on the reverse of the ballot under the written challenge, as required by law; and (c) that the appellate record contained evidence from which the court itself could make findings of fact and enter the proper judgment without a new trial. The three questions presented for review are directly related to those holdings. The first issue is whether the Supreme Court of Puerto Rico violated federal due process by rendering judgment without remanding for the taking of additional evidence (Pet. i, 11-17); the second is whether the federal due process "requires or even permits" the application of a clear, strong and convincing standard of proof in ballot contest cases (Pet. i, 17-20); and the third reiterates in terms of denial of a "fundamentally fair election" the issues as to whether petitioner was denied federal due process "by the Puerto Rico Supreme Court's novel and unanticipated electoral rulings," referring only to the rulings on the standard of proof applicable in ballot contest cases and on the ineffectiveness of a challenge lacking the signature of the challenger under the written challenge. (Pet. i, 20-23).

All the issues of local law decided by the Supreme Court of Puerto Rico were raised and considered during the presentation of the appeals. The parties involved, including the petitioner, submitted briefs on the question whether, as a matter of local law, the proper standard of proof in ballot contest cases was that of the preponderance of evidence or the stricter strong and convincing evidence standard. In his opposition to

review and in his brief on appeal, petitioner presented to the Supreme Court arguments and authorities in support of his contention that the preponderance of evidence standard should be applied to ballot contest cases and that the strong and convincing evidence standard was inapplicable. This was done in reply to respondent's contention, presented in his petition for review and in his brief on appeal, that in ballot contest cases the evidence to annul a vote must be strong and convincing rather than preponderant. Thus, during the presentation of the appeals, there was sharp and prolonged controversy between petitioner and respondent over the proper standard of proof to be applied in the case as a matter of local law.[6] The issue had never been decided by the Commonwealth Supreme Court prior to the present case. Thus, petitioner undoubtedly was bound to anticipate the possibility of an adverse ruling giving rise to the first and second federal questions presented in this petition. He may have believed that, if rendered, such adverse ruling would be erroneous. But he was fully alerted to the possibility of losing the point. There was nothing unexpected or surprising in the holding of the Supreme Court of Puerto Rico that the evidence to annul a vote must be clear, strong and convincing and not merely preponderant. The ruling was made on the basis of plausible interpretations of the Commonwealth Constitution, the Electoral Law and other principles derived from local jurisprudence. Certainly petitioner has no ground to claim that the decision of the Supreme Court upon this matter "unexpectedly" created a federal question that he could not fairly have anticipated. He was bound to contemplate the ruling rendered by the Commonwealth Supreme Court upon the standard of proof applicable to ballot contest cases and to take the precaution of presenting any federal issue arising therefrom. Cf.

---

[6] The issue regarding the proper standard of proof in ballot contest cases was also raised, as a matter of local law, by both petitioner and respondent during the Board proceedings. (Pet. 1h). The Board explicitly adopted the preponderance of evidence standard. (Pet. 1h, 24b-25b).

Pruneyard Shopping Center v. *Robins*, 447 U.S. 74, 85 n. 9; *Herndon* v. *Georgia*, 295 U.S. 441, 444-446; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 677-678, 682 n.9; and *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320.

There was nothing unexpected either in the decision of the Supreme Court of Puerto Rico that a challenge is void and ineffective when the challenger has failed to subscribe his signature under the written challenge. The question was raised and argued, as a matter of local law, during the Board's proceedings and the presentation of the appeals in the Supreme Court. According to the provisions of Article 5034 of the Puerto Rico Electoral Law, 16 L.P.R.A. § 3234 which establishes the procedure for challenging an elector, in order to challenge the ballot of a voter, the vote challenged "must be marked with the word 'challenged' on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge . . ." (Pet. 8f). In nine of the challenges involved in the present case (eight of them challenges to PDP votes for respondent Cepeda and one to an NPP vote for petitioner Molina) the challenger had failed to subscribe his signature under the written challenge which appeared on the reverse of the ballot. The challenger had merely entered his name, in his own handwriting, at the beginning of his challenge, but did not place his signature after or under the written challenge to give it his personal authentication and bind himself with whatever statements had been made therein. (Pet. 25a-28a, 94a-95a).

The Supreme Court of Puerto Rico ruled that the absence of the challenger's signature made the challenge ineffective and void, thereby upholding the validity of the vote without passing on the merits of the unsigned challenges. The court's ruling is based on the principle of strict compliance with the procedure established in the Electoral Law for challenging an elector. Considering the "fundamental nature of the right to vote" and "the fact that the challenge would allow inquiries into the vote of the challenged voter," strict compliance with such procedure was held to be "the only way to comply with

the constitutional obligation to guarantee the right to 'equal, direct and secret universal suffrage' and to protect the citizen 'against any coercion in the exercise of the electoral franchise'. Constitution, Art. II, Sec. 2" (Pet. 24a-25a). Certainly petitioner has no ground to claim that this was an "unforeseeably restrictive ruling on the technical requirements for challenging ballots" (Pet. 20) that unexpectedly created a federal question that he could not fairly have anticipated and had no opportunity to assert prior to his motion for reconsideration. Again petitioner may have believed that such a ruling would be erroneous, if rendered, but was fully aware of the possibility of the interpretation of the Electoral Law rendered by the Supreme Court of Puerto Rico. To place the matter in perspective, it should be noted that the question had never been decided by the Commonwealth Supreme Court prior to the present case. The Supreme Court of Puerto Rico did not reverse any of its own prior interpretations of the Electoral Law. It rendered a plausible and foreseeable interpretation of that statute. Petitioner cannot claim surprise. He assumed the risk that the interpretation of the Puerto Rico Supreme Court might differ from his own and that it would be too late to raise a federal question by motion for reconsideration or rehearing to the Commonwealth Supreme Court.

As to the Puerto Rico Supreme Court's determination that the court itself should make findings of fact based on the appellate record and enter the proper judgment without a new trial, which allegedly gave rise to the first federal question presented herein (Pet. i, 11-17), the whole point is again whether it should have been anticipated by petitioner. He cannot plead ignorance of the statutory provisions giving the Supreme Court of Puerto Rico power to enter, upon reversal of the decision below, the correct judgment without remanding for a new trial. Since 1903, the Supreme Court of Puerto Rico has been authorized, ". . . in furtherance of justice . . . [to] take cognizance of all the facts and proceedings in the case as they appear in the record, and likewise, [to] consider the merits thereof, so as to promote justice and right and to prevent injustice and delay." 4 L.P.R.A. § 36. Petitioner also came into

the highest court of Puerto Rico with notice of its practice to pass upon all legal and factual issues presented by the appellate record and to enter the proper judgment without a new trial, unless the evidence is insufficient for final determination of the case. In civil cases, where there is no trial by jury in the Commonwealth courts, this practice has been followed for final disposition of cases on appeal since the enactment of the 1903 statute. See, e.g., *Perez* v. *Acevedo Quinones*, 100 P.R.R. 891, 897-899; *Prieto* v. *Mayrland Casualty Co.*, 98 P.R.R. 583, 594-621; *Sanabria* v. *Heirs of Gonzalez*, 82 P.R.R. 851; and *Borinquen Furniture* v. *District Court*, 78 P.R.R. 858, 860 n. 6.

Petitioner was therefore bound to contemplate the possibility of the Commonwealth Supreme Court's refusal to remand in this case. He was fully aware that, if the Board was reversed upon the standard of proof issue, the Supreme Court of Puerto Rico would not remand for a new trial unless the evidence in the appellate record was insufficient. All available evidence had been presented by the parties during the Board's proceedings. No contention was made by either petitioner or respondents, during the presentation of their appeals, that they had been deprived of reasonable opportunity to present evidence at the trial, even though the hearings before the Board were conducted at a hurried pace due to the exigencies of the ballot contest case. The transcript of the testimonial evidence presented at the hearings, which is part of the appellate record, contains 6513 pages. (Pet. 1a). The appellate record also includes all the exhibits and the original record of the Board proceedings. In such a situation the petitioner may not plant himself as he did on the position that the Supreme Court of Puerto Rico, if it reversed the Board's decision on the proper standard of proof, would remand for additional evidence. Petitioner was bound to anticipate the possibility that the appellate court might reasonably find the evidence in the record sufficient to render final judgment without remanding for the taking of additional evidence. Thus, he cannot claim that such a ruling "unexpectedly" gave rise to a federal question as to whether failure to remand violates federal due process. The federal issue could fairly have been anticipated and presented

to the Supreme Court of Puerto Rico before final judgment was rendered in this case. The attempt to raise it for the first time by motion for reconsideration came too late.

The party seeking review must carry the burden of proving that the federal questions raised in his petition for certiorari were timely and properly presented to the Supreme Court of Puerto Rico. Rule 21.1(h). See e.g., *Street* v. *State of New York*, 394 U.S. 576, 582. Petitioner Molina has made no such affirmative showing. Indeed, the opposite has been clearly demonstrated. The federal questions were not raised at the proper juncture in the Commonwealth Supreme Court Proceedings. The petition should be denied for want of jurisdiction.

II. The Federal Questions Presented For Review Are Not Substantial And Do Not Warrant The Exercise Of This Court's Discretionary Certiorari Jurisdiction.

The first question presented is whether the Supreme Court of Puerto Rico "violated federal due process requirements by rendering judgment without remanding for the taking of additional evidence." (Pet. i). It is argued that, since the Board applied the preponderance standard in evaluating the evidence presented at the hearings, the Supreme Court of Puerto Rico could not apply, in accordance with federal due process, the stricter "clear, strong and convincing" standard to evaluate the evidence in the appellate record and enter a final judgment without remanding for the taking of additional evidence. The court's failure to remand, so it is argued, denied petitioner "notice and meaningful opportunity to be heard."[7]

The issue as to the proper standard of proof first arose at the hearings conducted by the Board. Respondents moved orally to have the Board apply a clear and convincing standard. (Pet. 1h). The question at that time had never been considered or resolved by the Commonwealth Supreme Court.[7] The Board

[7] Petitioner states that the application of the clear, strong and convincing standard to electoral ballots contests "represent a radical change in the standard of proof that could not have been foreseen by the parties." (Pet. 11). This assertion is inexact. The question of the

decided to use the preponderance of evidence standard and applied it in adjudicating the challenged ballots. (Pet. 22a). On appeal, in view of "the privileged status given by the Constitution [of Puerto Rico] to the exercise of suffrage free of coercion, and to its secretiveness," the Supreme Court of Puerto Rico reversed the Board's ruling. It held that fact-finding in ballot contest cases, where the validity and integrity of a vote is to be decided, must be governed by the more stringent "clear, strong and convincing" standard of proof. (Pet 17a-22a). In addition, the Supreme Court of Puerto Rico decided to make the required findings of fact itself, on the basis of the evidence in the appellate record which included a transcript of all testimonial evidence presented at the hearings, as well as the exhibits and the original record of the Board proceedings. It proceeded to make all the required findings of fact and conclusions of law and entered final judgment without remanding for the taking of additional evidence. (Pet. 65a-109a).

The adoption of a standard of proof requiring that the evidence to annul a vote must be "clear, strong and convincing" establishes a rule or instruction addressed to the fact-finder concerning the degree of belief he should have in the correct-

---

applicable standard in ballot contests had never been considered by the Commonwealth Supreme Court nor by any other court in Puerto Rico prior to the present decision. Moreover, the parties were very much aware of the issues since the beginning of the Board proceedings. Until 1979 a general rule included in the Puerto Rico Civil Procedure Code (32 L.P.R.A. §1679) stated that in civil cases the decision must be made according to the preponderance of proof. But this general rule was riddled with exceptions, as pointed out in the court's opinion in this case. (Pet. 18 a-n 21). The Code provisions have only been applied to administrative proceedings "in appropriate cases . . . when those principles propiciate a fair solution" *Berrios* v. *Mining Commission*, No. R-70-266 (P.R. May 6, 1974) (Pet. 2j). The 1979 Rules of Evidence, 32 L.P.R.A. App. IV, reenacted the general rule that in civil cases the preponderance test applies. But all the exceptions, where a stricter standard of proof is required, were left outstanding. Although the Board decided to apply the preponderance test at the trial, rather than the strong and convincing formula, it was well aware that it was passing upon an open question. (Pet. 24b)

ness of his factual conclusions for that particular type of adjudication. It requires the trier to have a stronger degree of conviction or belief in the existence or non-existence of a fact before finding in favor of the party having the persuasion burden. Such a standard of proof refers not to the number of witnesses or the quantity of evidence, but to the persuasive effect of the evidence on the mind of the trier of fact. When the preponderance of evidence test is used, the degree of conviction or belief as to the existence or non-existence of the disputed facts need not be as strong as under the clear and convincing standard of proof. See *Re Winship*, 397 U.S. 358, 378-381 (Justice Harlan concurring); James and Hazard, *Civil Procedure* (2d. ed. 1977) 240-9.

Petitioner apparently claims that, if he had known at the time when the hearing was held before the Board, that clear and convincing evidence was required to annul a vote, instead of mere preponderance of evidence, he would have presented additional evidence or evidence of a different kind in support of his contentions. There is no foundation in fact or in theory for such an argument. Petitioner was given a full hearing before the Board. A reasonable opportunity was given to him at that hearing to introduce evidence relevant to the ballot contest. No additional facts became relevant after the Supreme Court of Puerto Rico adopted the "clear and convincing test." Exactly the same kind of facts are relevant under both the clear and convincing test and the preponderance test. The kind or quantity of evidence or the number of witnesses called for were not changed by the adoption of a stricter standard of proof. Petitioner's right to a full hearing was not harmed by the adoption of the clear and convincing test after the close of the hearing.

No litigant ever determines the kind or quantity of the evidence he gathers and introduces at a hearing in a civil case by looking at the standard of proof which is required. Litigants in civil cases have the responsibility of investigating and furnishing the evidence upon which such cases are to be decided. They conduct the best possible investigation and present the strongest possible evidence for their case, regardless of the ap-

plicable standard of proof. Apart from the parties' natural inclination to put in all of their evidence to make their cases as strong as possible, there is a rational explanation for the parties' disregard at the trial stage of the standard of proof formulas. The burden of persuasion becomes a crucial factor only when all of the evidence has been introduced. At that time, if the clear and convincing test is applicable, the trier must find that the fact is highly probably true to decide the issue in favor of the litigant having the burden of persuasion. If the trier applies the preponderance formula, he then must find that the fact is probably true to make the same decision. See McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 246 n. 44 (1944); McCormick, *Handbook of the Law of Evidence* (2d. ed. 1972), 784, 793, 796-798. Thus, until the trial is over and all the evidence of both parties has been presented, the difference in persuasive effect called for under these two formulas has no application. It does not serve as a guideline for the parties as to the kind or quantity of evidence that they should present to prove a claim.

Contrary to petitioner's allegation, there is no conflict between the Supreme Court of Puerto Rico's decision to apply the clear and convincing standard of proof to the existing appellate record and to enter the proper final judgment without remand, and the applicable precedents of this Court and of the circuit courts of appeals. In *Saunders* v. *Shaw*, 244 U.S. 317, this Court held that it was a denial of due process to refuse to entertain the defendant's petition for rehearing because the Supreme Court of Louisiana had entered judgment without allowing him to introduce evidence to contradict the plaintiff's evidence. The situation there bears no resemblance to the facts in the instant case. In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), this Court's ruling that the state court had denied the plaintiff due process expressly stated that "at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax." (At 679). This decision is based on the fact that a retroactive change in remedial rules denied plantiff the only remedy ever available to him against an unconstitutional tax exaction. In

West Ohio Gas Co. v. *Public Utilities Commission*, 294 U.S. 63, after the rate hearings had concluded, the Commission adopted a new method of allocating distribution expenses without notice to the plaintiff and received new evidence without giving him any opportunity to supplement or explain such new evidence. This was held to be a denial of due process. Clearly these two cases are neither similar nor relevant. As to *Hatch* v. *FERC*, No. 80-1561 (D.C. Cir. June 26, 1981), the issue resolved therein arose under the Administrative Procedure Act provision that the person involved in an agency adjudicatory hearing "shall be timely informed of . . . [the] law asserted." 5 U.S.C. 554 (b) (3). The Commission changed a controlling standard of law and applied it retroactively in an adjudicatory setting without notice to the applicant and an opportunity to introduce evidence bearing on the new standard. The original standard required that the application for authorization to hold interlocking directorships be approved in the absence of evidence that the interlock would result in specific adverse effects. The new standard changed the nature of the proof required of the applicant. It required him to show that a clear and overriding benefit would flow from the interlock sufficient in magnitude to outweigh the evil inherent therein. The court of appeals held that the change was such that "additional facts of a different kind may now be relevant for the first time," so that applicant was entitled to submit new evidence relevant to the newly announced standard. (At 22-23). In the instant case the adoption of a clear and convincing standard of proof did not make additional facts or evidence of a different kind relevant for the first time to the issues in the ballot contest. The *Hatch* case is therefore clearly inapposite.

The Supreme Court of Puerto Rico's decision not to remand for the submission of additional evidence raises only questions of local law. Such decision turns on the appellate powers of the Commonwealth Supreme Court, on its appreciation of the sufficiency of the appellate record, and on its estimate of the need for prompt disposition of the electoral ballot contest case. Petitioner has tried to turn these conven-

tional matters of local law into constitutional issues under the Due Process Clause of the Fifth Amendment and of the Fourteenth Amendment. The arguments presented to constitutionalize the local issues are insubstantial and unwarranted. Even if the failure to remand were held to raise a federal question of substance, the decision of the Supreme Court of Puerto Rico on this issue is clearly correct and it does not conflict with the decisions of this Court or of any federal court of appeals. Therefore, this Court's discretionary certiorari jurisdiction should not be exercised herein.

The second question presented for review is "whether federal due process requires or even permits the application of a 'clear, strong and convincing evidence' standard of proof to challenges filed by voters or candidates to the validity of ballots cast for candidates of opposing political parties." (Pet. i). It is argued that (a) this Court's decision in *Addington* v. *Texas*, 441 U.S. 418, does not support the Supreme Court of Puerto Rico's adoption of a standard of proof more demanding than a preponderance of the evidence (Pet. 18-19); and (b) this Court's decision in *Addington* affirmatively proscribes the imposition of a clear and convincing standard of proof in an election ballot contest case. (Pet. 19-20).

The Supreme Court of Puerto Rico relied in part on the reasoning stated by this Court in *Addington* to justify its adoption and application of the clear and convincing standard of proof in the instant election ballot contest case. It did not consider *Addington* binding, as only a matter of local law was involved. (Pet. 18a-21a). Whether the Supreme Court of Puerto Rico was justified or not in using the reasoning of this Court's decision in *Addington* is a matter concerning local law exclusively. This is enough to dispose of petitioner's contention that "the due process analysis in *Addington* does not support the Puerto Rico Supreme Court's imposition of a standard of proof more demanding then a preponderance of the evidence . . ." (Pet 18) and that "the court below . . . misread *Addington* when it considered only the interests of the challenged voter." (Pet. 19).

As to petitioner's additional contention, that *Addington* "affirmatively proscribes the imposition of such a standard" (Pet. 20), it is clearly unwarranted. This Court held in *Addington* that the preponderance standard falls short of meeting the demands of due process in state involuntary commitment proceedings. It also held that the reasonable doubt standard is not required by due process in such proceedings, although the states are free to use that standard. In order to meet the demands of due process, in civil commitment proceedings, the states have to use a "clear and convincing standard" which informs "the fact-finder that the proof must be greater than the preponderance of the evidence standard applicable to other categories of civil cases." (At 433). Thus, in *Addington* this Court was concerned only with establishing a constitutional minimum of proof. Petitioner now attempts to find in *Addington* a doctrine which establishes a constitutional maximum of proof. Neither the holdings nor the reasoning in *Addington* support petitioner's contention that it proscribes under the Due Process Clause the imposition of a clear and convincing standard of proof in election ballot contests. Any doubt as to the permissibility of presumptions fixing the burden of proof of persuasion in civil cases was laid at rest by *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 443-446. The determination that the evidence to annul a vote in an electoral ballot contest case must be clear, strong and convincing, is also a matter of state law. Moreover, the imposition of such a standard of proof in electoral ballot contest proceedings, contrary to petitioner's contentions, meets all the demands of federal due process. It is rational and fair to protect the right to vote and the interests of the voter more than the interests of the candidates or parties who are challenging the vote's validity.

The second question presented does not raise, therefore, a substantial federal question. Even if requiring clear, strong and convincing evidence to annul a vote in an electoral ballot contest were held to raise a federal question of substance, the decision of the Supreme Court of Puerto Rico adopting such requirements is clearly correct and it does not conflict with the

decisions of this Court. Thus, this Court's discretionary certiorari jurisdiction should not be exercised herein.

The third and last question presented for review is "whether petitioner has been denied a fundamentally fair election, and hence deprived of due process of law, by the Puerto Rico Supreme Court's novel and unanticipated electoral rulings." (Pet. i). The rulings to which reference is made are (a) the failure to remand for the taking of additional evidence upon adopting the clear, strong and convincing standard of proof in the instant electoral ballot contest case; and (b) the holding that a challenge is ineffective and void when the challenger fails to subscribe his signature on the reverse of the ballot under the written challenge, as required by the Electoral Law. 16 L.P.R.A. 3234. (Pet. 22-23).

There is no valid ground for calling these rulings "novel and unanticipated." The holding of the Supreme Court of Puerto Rico as to the proper standard of proof in electoral ballot contest proceedings under the new 1977 Electoral Law was "novel" only in the sense that the Supreme Court of Puerto Rico had not considered or ruled upon the matter prior to its decision in this case. But the parties and the administrative judges below were fully aware of the controversy surrounding the proper standard of proof. The issue was first raised at the trial of the case. (Pet. 1h). The Board ruled that the preponderance of evidence standard was applicable. (Id.) In its decision, the Board took great care in trying to justify its adoption of the preponderance test. (Pet. 24b-25b). On appeal to the Supreme Court of Puerto Rico, petitioner and respondents presented to the Supreme Court arguments and authorities in support of their conflicting views as to the proper test to be applied. The sharp and prolonged controversy between the parties as to whether the evidence to annul a vote must be strong and convincing, rather than preponderant, as a matter of local law, was finally resolved by the Supreme Court of Puerto Rico's decision in favor of the stricter standard of proof. The court in so holding did not reverse any of its prior jurisprudence. It ruled upon an open and doubtful question under the new 1977 Electoral Law. (See p. 14 n. 7, supra).

As to the failure to remand, under the applicable statute and the Supreme Court of Puerto Rico's established practice in civil cases, when the decision below is reversed, the court must make its own findings of fact and conclusions of law on the basis of the appellate record, and must enter the proper judgment without a new trial, unless the evidence is insufficient for final determination of the case. (See pp. *12-13*, supra). Certainly there was nothing "novel and unanticipated" in the court's refusal to remand in this case.

The court's ruling that ballot challenges are void and ineffective when the challenger merely enters his name at the beginning of his challenge, but does not place his signature under the written challenge to give it his personal authentication and bind himself with whatever statements have been made therein,[8] was based on the provisions of the Electoral Law requiring that the vote challenged "must be marked with the word 'challenged' on the reverse, with a brief statement as to the reason for the challenge, signed by the person or the polling place inspector who issues the challenge . . . ." See 19 L.P.R.A. § 3234. Considering the "fundamental nature of the right to vote" and "the fact that the challenge would allow inquiries into the vote of the challenged voter," the court required strict compliance with the statutory procedure. (Pet. 24a-25a). The statutory provision in issue first appeared in the

---

[8] Petitioner's description of the court's ruling is inaccurate. He states that the ruling was "that ballot challenges are a legal nullity unless the challenger's signature is placed at the *end* of the challenge instead of in the *body* of the challenge." (Emphasis by petitioner) (Pet. 23). The court's decision clearly shows that in the challenged ballots involved, the challenger had merely entered his name at the beginning of his challenge, in his own handwriting, but had not placed his signature under the written challenge to give it his personal authentication and bind himself with whatever statements had been made therein. (Pet. 25a-28a, 94a, 95a). The court held that "signature and name are not equivalent" and that "when the challenger entered his name at the beginning of his challenge he did not sign it as required by law." (Pet. 26a).

new electoral law of 1977. 16 L.P.R.A. § 3234. This was the first election held pursuant to its terms. The construction of the 1977 statutory provision involved had never been considered by the Commonwealth Supreme Court prior to the present decision. But the parties and the administrative judges below were well aware that it was an open and doubtful issue.

Petitioner apparently suggests that because the decision of the Supreme Court of Puerto Rico came after the election, and resolved unsettled issues under the new 1977 Electoral Law, these rulings were novel and unanticipated, retroactive, unconstitutional and a violation of his rights. (Pet. 22-23). This is obviously untenable. Judicial decisions construing election statutes and determining the validity of ballots are necessarily rendered after the ballots are cast. Petitioner's contention would castigate all such decisions as "novel and unanticipated" and "retroactive," and, therefore, an unconstitutional deprivation of the rights of the losing party.

Petitioner claims that "the retroactive effect of the Puerto Rico Supreme Court's novel rulings" was to deprive him of "a fair election." (Pet. 23). He only points out two such alleged effects. First, the Court's refusal to remand "deprived petitioner of an opportunity to substantiate the challenges to ballots cast for respondent Cepeda under the Court's novel standard of proof." (Pet. 22-23). Second, the Court's ruling that challenges are void and ineffective unless the challenger subscribes his signature under the written challenge is not one required by the statutory provision governing challenges (Pet. 23), and "at least in District No. 35, challengers were not generally apprised of any such requirement." (Id.). Thus, petitioner concludes that "if challengers had been aware of such a technicality when their challenges were made at the polling place, they could and would have complied, thereby preserving their opportunity to protect their vote from dilution caused by the counting of illegal ballots." (Id.).

Neither of the two "effects" in fact have resulted from the decision of the Supreme Court of Puerto Rico in this case. The refusal to remand was clearly correct and petitioner was not

entitled to a new hearing because of the adoption of the clear and convincing standard of proof. See pp. 16-19, supra. The requirement that challengers subscribe their signature under the written challenge is clearly spelled out in the statutory provision governing challenges. See 16 L.P.R.A. § 3234. The holding that such a requirement must be strictly complied with is not only reasonable but could also have been anticipated by all persons concerned. In fact, the great majority of the challengers in the forty cases considered by the Puerto Rico Supreme Court complied with this requirement. In only nine of the cases adjudicated by the Supreme Court of Puerto Rico were challenges annulled because of the absence of a subscribed signature. (Pet. 94a-95a). In addition, the assertion that "at least in District 35, challengers were not generally apprised of any such requirement" is based solely on the inference made by the dissenting Justice in his opinion that "[i]t was . . . incumbent upon the Polling Place Board to guide and supervise the challenge process so that it could be effective," and *thus* whenever the challenger failed to sign properly, it must have been due to the failure of the Polling Place Board to warn him of the requirement. (Pet. 155a).

In any event, whether informed or not, a challenger must comply with the electoral law of the Commonwealth at least when, as here, it has been fairly and evenly interpreted by the highest court of Puerto Rico. If he does not, and the challenge is held to be void, the federal rights of candidates and voters are not violated.

All this goes to show that there is no basis for petitioner's claim that he was deprived of a fundamentally fair election, in violation of the Due Process Clause, by reason of the Supreme Court's failure to remand and by the ruling requiring the challenger's signature under the written challenge. We respectfully submit that this Court should decline the invitation to rule upon whether a candidate for public office in a state election has a due process right to a fundamentally fair election, as requested by petitioner. (Pet. 20-21). No such issue is presented here. The present case would be singularly inap-

propriate for this Court to explore the role of the Due Process Clause in the actual operation of the state electoral process, and to trace the limits of what constitutes a "fundamentally fair election," as suggested by petitioner. (Pet. 21-22).[9] No amount of inflation can turn the conventional local law issues involved in this case into federal constitutional issues of substance. The decision of the Supreme Court of Puerto Rico is clearly correct and it did not deprive petitioner of a fair election.

---

[9] Compare, *Partido Nuevo Progresista* v. *Perez*, 639 F2d 825 (1st Cir. 1980); *Griffin* v. *Burns*, 570 F2d 1065 (1st Cir. 1978); *Hennings* v. *Grafton*, 523 F2d 861 (7th Cir. 1975); *Pettengill* v. *Putnam Cty. R-1 School District*, 472 F2d 121 (8th Cir. 1973); *Powell* v. *Power*, 436 F2d 84 (2d Cir. 1970); and *Briscoe* v. *Kusper*, 435 F2d 1046 (7th Cir. 1971).

CONCLUSION

For the reasons stated, respondents submit that this cause should not be reviewed by this Court and that the petition should be denied.

Respectfully submitted,

LINO J. SALDANA
Counsel of Record

SALDANA, LOPEZ-BARALT
& FEBUS-BERNARDINI
Post Office Box 13954
Santurce, Puerto Rico 00908
Caso Building, Suite PH-2
1225 Ponce de Leon Avenue
Santurce, Puerto Rico 00907
Telephone: (809) 724-5545
Attorneys for Respondents
Popular Democratic Party and
Samuel Cepeda

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
OCT 19 [illegible]
ALEXANDER L. STEVAS,
CLERK

No. 81-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OSVALDO MOLINA, *Petitioner*

v.

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Of Counsel:

HECTOR M. LAFFITTE
Chase Manhattan Bank Bldg.
Hato Rey, Puerto Rico 00918

ANTONIO CORDOVA
Bank of San Juan Tower
San Juan, Puerto Rico 00901

MICHAEL J. HENKE
Counsel of Record

JOHN D. TAURMAN
ANN M. ASHTON
VINSON & ELKINS
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-6500

Counsel for Petitioner
Osvaldo Molina

October 19, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

I. The Questions Presented in the Petition for Certiorari Were Properly and Timely Presented to the Supreme Court of Puerto Rico 2

II. The Federal Questions Presented Are Substantial 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Addington v. *Texas*, 411 U.S. 418 (1979) 2, 3, 6, 7

American Surety Co. v. *Baldwin*, 287 U.S. 156 (1932).. 5

Antonio Garcia v. *Mendez*, No. R-68-151 (P.R. May 31, 1974) 4

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 5

In Re Urbasek, 38 Ill.2d 535, 232 N.E.2d 716 (1967) ... 7

In Re Winship, 397 U.S. 358 (1970) 2

In the Matter of Arlene S, 311 N.Y.S.2d 927, 63 Misc. 2d 253 (1970) 7

Missouri v. *Gehner*, 281 U.S. 313 (1930) 5

Ocasio v. *Diaz*, 88 P.R.R. 658 (1963) 4

Ohio v *Akron Metropolitan Park District*, 281 U.S. 74 (1930) 5

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 5

Saunders v. *Shaw*, 244 U.S. 317 (1917) 5

Tippett v. *Maryland*, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972) 6

Table of Authorities Continued

Page

STATUTES:

4 L.P.R.A. § 36 4

16 L.P.R.A. § 3024 4

SECONDARY MATERIALS:

In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4 (1967) 7

No. 81-434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OSVALDO MOLINA, *Petitioner*

v.

POPULAR DEMOCRATIC PARTY and SAMUEL CEPEDA, *Respondents*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Respondents' extensive Brief in Opposition to the petition for certiorari contains at least one serious misstatement and several misunderstandings either of petitioner's position or of the procedural posture of this case. Accordingly, the following brief reply is necessary.

I. THE QUESTIONS PRESENTED IN THE PETITION FOR CERTIORARI WERE PROPERLY AND TIMELY PRESENTED TO THE SUPREME COURT OF PUERTO RICO.

Part I of the Brief in Opposition (hereafter "Br. Op."), pp. 7-14, is based primarily on a serious misstatement of the record below and on an apparent misunderstanding of petitioner's position.

The misstatement occurs in the second sentence of part I:

> "Prior to that judgment [of the Supreme Court of Puerto Rico] no federal question had been raised either in the Electoral Review Board or in the Commonwealth Supreme Court." (Br. Op. 7).

Squarely contrary to that assertion, respondents' own Petition for Review, filed with the Supreme Court of Puerto Rico on January 20, 1981, contains a section entitled "Justification and Constitutional Basis for the Clear and Convincing Evidence Standard," in which respondents flatly stated: "The degree of evidence required by the due process clause depends on the importance of the values at stake." (Translation at 61). Respondents' petition then cited *Addington* v. *Texas*, 441 U.S. 418 (1979), for the proposition that the clear and convincing evidence standard is "constitutionally required." (*Id.* at 63; *see also id.* at 62, 70.)[1]

Again, in their brief on the merits below, respondents argued that "the constitutional guarantees of the universal and equal vote, of equal protection under the law, and of due process of law require that the voiding of a vote be supported by clear and convincing proof." (Brief at 45). Citing *In re Winship*, 397 U.S. 358 (1970), respondents asserted that "the degree of persuasion necessary for an adjudging forum to arrive at a determination is a problem of due process of law." (*Id.* at 51). Again relying on

---

[1] The same argument had been made by respondents in a January, 7, 1981 Motion [to the Supreme Court of Puerto Rico] Petitioning Order to Transcribe and Protect Recordings: "In this situation only clear, unequivocal and convincing proof of a real change of residence could justify the annulment of a vote. This is the norm followed *through constitutional requirement* in civil litigation involving fundamental rights. Addington v. Texas, 99 S.Ct. 1804." (Emphasis added).

Addington v. *Texas*, respondents also asserted that in a situation like this one, "the courts apply, as a minimum, an intermediate formula of judicial scrutiny of the evidence." (*Id.* at 52).

It was against this background that the Supreme Court of Puerto Rico prefaced its discussion of *Addington* with the holding that: "Whenever a fundamental right is denied, the due process of law requires that the value and sufficiency of the evidence be measured with more stringent standards." (Pet. 18a). To be sure, the Puerto Rico court grounded its conclusion that the right to vote is a fundamental right on the Constitution of the Commonwealth of Puerto Rico. (*Id.* at 17a-18a). But the separate holding that due process requires "more stringent standards" to protect such fundamental rights was grounded squarely on this Court's decisions concerning the implications of federal due process, as were the arguments of respondents below. Thus, the *Addington* issue concerning the standard of proof (question 2) was not only properly and timely presented to the Supreme Court of Puerto Rico but actually decided by that court as well.

Respondents' misunderstanding is reflected in their contention that petitioner had a duty to foresee an adverse ruling on the first issue presented here—whether the Puerto Rico Supreme Court violated federal due process requirements by rendering judgment without remanding for the taking of additional evidence under the clear and convincing standard of proof. Respondents' assertion in support of this contention, that petitioner should have anticipated an adverse ruling on the standard of proof (Br. Op. 10), ignores the fundamental distinction between the procedural question whether a remand was required (question 1) and the substantive issue whether the "clear, strong and convincing evidence" standard is required or even permitted in determining election challenges (question 2). That petitioner could have anticipated an adverse ruling

as to the applicable standard of proof (an issue fully briefed prior to judgment) does not create an obligation that petitioner anticipate that the Puerto Rico Supreme Court would proceed to evaluate the evidence, make new fact findings, and render judgment for respondents by applying the new standard to the old evidence.[2]

Respondents' more direct argument at Br. Op. 12-13 that petitioner was obligated to anticipate the lower court's disposition of this case because of 4 L.P.R.A. § 36 wholly ignores the specific requirements of the Electoral Law, 16 L.P.R.A. § 3024 (Pet. 3f):

> "The *findings of fact of the Board shall be final*, but any aggrieved party may bring an appeal for review to the Supreme Court of Puerto Rico based on questions of law, provided it is done within the terms established in § 3023 of this title." (Emphasis added).

---

[2] The foreseeability of the Puerto Rico Supreme Court's adverse ruling on the standard of proof is thus irrelevant to Part I of respondents' brief (*i.e.*, irrelevant to whether *any* of the questions presented in the petition were properly and timely presented to the Commonwealth court.) The foreseeability of the court's adoption of the "clear, strong and convincing evidence" standard is relevant only to the *merits* of the third question presented in the petition. (Pet. 22-23). In that regard we reiterate that the preponderance standard, specified in the rules of evidence, has been held applicable to "any" civil case and has been customarily applied to administrative proceedings in Puerto Rico. (Pet. 11). The exceptions with which the preponderance rule is assertedly "riddled" (Br. Op. 15, n.7) actually come down to only one. Strong and convincing evidence is apparently required to rebut the presumption that property acquired during marriage is considered to be part of the community property. (Pet. 18a, n.21). But in "actions for filiation based on possession of status," the "strong and convincing evidence" standard was abandoned in Ocasio v. Diaz, 88 P.R.R. 658 (1963) (*see* Pet. 18a, n.21), and in fraud cases, contrary to its opinion below (*id.*), the Puerto Rico Supreme Court now applies "the general rule requiring preponderance of evidence," Antonio Garcia v. Mendez, No. R-68-151 (P.R. May 31, 1974) (Pet. 2i).

Thus, whatever the 1903 statute may have authorized in ordinary Supreme Court review proceedings, the 1977 Electoral Law specifically provided that in cases like this one "the findings of fact of the Board shall be final." Petitioner was obviously entitled to assume that the Electoral Law would be followed by the Puerto Rico Supreme Court in reviewing electoral cases coming before it pursuant to that law. The existence of the statute therefore relieved petitioner of any legal duty to anticipate that the Puerto Rico Court would make its own fact findings and render judgment in favor of respondents. *Cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 681-82 (1930); *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980). In short, here the federal claim "arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court." *See American Surety Co.* v. *Baldwin*, 287 U.S. 156, 164 (1932). In those circumstances the first question posed by the petition for certiorari was properly and timely presented in the petition for rehearing. *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917) ("defendant was not bound to contemplate a decision of the case before his evidence was heard"); *Ohio* v. *Akron Metropolitan Park District*, 281 U.S. 74, 79 (1930) ("the question would have been speculative" if raised prior to judgment by the lower court); *Missouri* v. *Gehner*, 281 U.S. 313, 320 (1930). For the same reasons, that portion of question 3 which relies upon the unexpected disposition of this case by the lower court (Pet. at 22-23) was also properly presented.[3]

---

[3] That portion of question 3 which depends upon the lower court's ruling that ballot challenges are a legal nullity unless the challenger's signature is placed at the end thereof (Pet. 23) was raised in the dissenting opinion of Justice Martin. (Pet. 155a, 157a). Surely where a majority of the court rejects a federal question presented by one of its members in dissent, that question has been raised and passed upon by the lower court.

II. THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

As a fallback position, respondents argue that the federal questions presented by the petition are insubstantial and do not warrant consideration by this Court. Again respondents' arguments require a brief response.

With respect to question 1, respondents argue that the standard of proof does not change "the kind or quantity of evidence or the number of witnesses called for" (Br. Op. 16); that "no litigant ever determines the kind or quantity of the evidence he gathers and introduces at a hearing in a civil case by looking at the standard of proof which is required" (*id.*); and that "until the trial is over and all of the evidence of both parties has been presented," the difference in standards of proof "has no application" (*id.* at 17). Respondents' glib assertions drastically limit the import of this Court's admonition that "adopting a 'standard of proof is more than an empty sematic exercise'." *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) [quoting from *Tippett* v. *Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dimissed sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972)].

Respondents' position is that the standard of proof "refers not to the number of witnesses or the quantity of evidence, but to the persuasive effect of the evidence on the minds of the trier of fact." (Br. Op. 16). This assertion ignores the fact that there is necessarily at least some rough correlation between the quantity of evidence and its persuasive effect, even if that correlation is not always one to one. This Court appears to have had that very point in mind when it noted in *Addington* that the preponderance of evidence standard entails the risk "that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct." 441 U.S. at 427. Moreover, even if there were no correlation

between quantity of evidence and persuasive effect, respondents' position ignores the fact that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has presented the greater quantum . . . ." Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 Family Law Quarterly, No. 4 at 26-27 (1967). If the parties tried the case below on the basis of such a misinterpretation, the standard *would* have affected the "kind or quantity of evidence" produced.

It is undoubtedly for these reasons that courts which have addressed the issue have uniformly held that the specification of a new and higher standard of proof requires that "the cause should be remanded for a new trial in which the correct standard would be applied." *In Re Urbasek*, 38 Ill. 2d 535, 232 N.E. 2d 716, 720 (1967); *see also In the Matter of Arlene S.* 311 N.Y.S. 2d 927, 63 Misc. 2d 253 (1970) (petitioner "is entitled to another day in court. There is a difference in the quantum of proof required between these standards"); Pet. at 146a-148a.

With respect to question 2, respondents make no effort to defend the holding of the court below on the *Addington* issue, other than their wholly untenable assertion that the issue was briefed and decided as a matter of local law. (Br. Op. 19). Respondents do, however, take issue with petitioner's argument (Pet. 19-20) that *Addington* affirmatively proscribes the standard adopted below. (Br. Op. 20). Respondents' ethereal distinction between "a constitutional minimum of proof" and "a constitutional maximum of proof" (*id.*) overlooks *Addington's* pragmatic focus on a "fair balance" between adversaries, *see* 441 U.S. at 431. Certainly, the balance can be unconstitutionally unfair when the standard of proof is too high as well as too low, so long as the pinch is felt by an adversary asserting interests protected under the Due Process Clause. Moreover, in de-

fending the balance struck below as "rational and fair" (*id.*), respondents fail to acknowledge that voting rights are at stake for *both* the challenged voter and the challenging voter. (Pet. 18-19).

Finally, respondents assert that this case is an "inappropriate" vehicle for exploring question 3, the role of the Due Process Clause in assuring fundamentally fair electoral administration. (Br. Op. 21-25) The essence of respondents' position is that there is nothing unfair in depriving petitioner of a remand (discussed above) or in throwing out ballot challenges on a technicality that neither the electoral law[4] nor electoral officials disclosed at the time of the election. Contrary to respondents' contentions (*id.* at 23), such rulings are not the inevitable consequence of post-election electoral proceedings. The extent to which due process confines the states' discretion in this area is thus fairly presented in this case and is undeniably substantial.

---

[4] The language of the pertinent statutory provision refutes respondents' claim that "[t]he requirement that challengers subscribe their signature *under* the written challenge is clearly spelled out" in the Electoral Law. (Br. Op. 24; emphasis added). The statute requires only that the challenger's signature appear on the "reverse" side of the ballot without otherwise specifying it location. (*See* Pet. 8f).

CONCLUSION

For the reasons stated, this Court should grant certiorari and consider the important unresolved issues presented by the petition.

Respectfully submitted

Of Counsel:

HECTOR M. LAFFITTE
Chase Manhattan Bank Bldg.
Hato Rey, Puerto Rico 00918

ANTONIO CORDOVA
Bank of San Juan Tower
San Juan, Puerto Rico 00901

October 19, 1981

MICHAEL J. HENKE
Counsel of Record

JOHN D. TAURMAN
ANN M. ASHTON
VINSON & ELKINS
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-6500

Counsel for Petitioner
Osvaldo Molina